133-83

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1288.

THE OHIO CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 4, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 5, 1889.

1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, western division, held at the United States court-room, in the city Toledo, in said district aforesaid, before the Honorable Howell E. Jackson, circuit judge for the sixth circuit, and Honorable Walter Q. Gresham, circuit judge for the seventh circuit, on the 17th day of June, being a day of the June term, 1889, of said court, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the United States of America.

MARTIN W. SANDERS, *Clerk.*

2 Afterwards, to wit, on the 7th day of January, A. D. 1884, the following bill was filed, to wit:

In the Circuit Court of the United States for the Sixth Circuit and Northern District of Ohio, Western Division.

Bill.

To the judges of the circuit court of the United States for the northern district of Ohio, western division:

The Central Trust Company of New York, a corporation created by and existing under the laws of the State of New York and a citizen and resident of said State, having its principal place of business in the city of New York, in said State, brings this its bill of complaint against the Ohio Central Railroad Company, a corporation created by and existing under and by virtue of the laws of the States of Ohio and West Virginia and being a citizen of said States, and having its principal office for the transaction of business in the city of Toledo, in the State of Ohio; and thereupon your orator complains and says:

I. That on and prior to the 1st day of January, 1880, there existed in the State of Ohio a railroad corporation, duly created under and by virtue of the laws of said State of Ohio, known as the Ohio Central Railroad Company and hereinafter styled the original Ohio Central Railroad Company, which was duly formed by the consolidation, under the laws of said State, of two corporations known
3 respectively as the Columbus and Sunday Creek Valley Railroad Company and the Ohio Central Railroad Company, each having been duly created and existing under and by virtue of the laws of the said State of Ohio.

II. That on said 1st day of January, 1880, the said original Ohio Central Railroad Company, by its president and secretary and under its corporate seal, made and executed its three thousand bonds, numbered consecutively from one to one thousand, inclusive, each for the sum of one thousand dollars, bearing date on said 1st day of January, 1880, and by the terms of each of said bonds the said original Ohio Central Railroad Company promised to pay to your orator or

bearer the sum of one thousand dollars in gold coin of the United States, of the then standard of weight and fineness, at the Metropolitan National Bank, in the city of New York, on the 1st day of January, 1920, together with interest thereon at the rate of six per cent. per annum, payable in like gold coin on the first days of January and July in each year, on the surrender of the interest warrants annexed to said bonds, according to their tenor; that the said bonds were so made and executed in pursuance of a resolution to that end duly adopted by the board of directors of said corporation, which resolution was thereafter, and prior to the execution of said bonds and the indenture of mortgage hereinafter mentioned, duly ratified by the unanimous vote of all the stockholders of said original Ohio Central Railroad Company at a meeting duly called and held on the 29th of December, 1879; that subsequent to said 1st day of January, 1880, the said last-mentioned company issued and delivered and sold, or caused to be issued, delivered, and sold, the said three thousand bonds, with the interest warrants attached and duly authenticated by the certificate of your orator, the trustee named in the mortgage hereinafter mentioned, as by said mortgage required, and said bonds are now outstanding in the hands of divers persons as holders thereof.

III. That on said 1st day of January, 1880, the said original Ohio Central Railroad Company, being the owner and
4 in possession of the railroad and property hereinafter described, did, in order to secure the payment of the principal and interest of said issue of three thousand bonds as the same should mature, and in pursuance of the further provision of said resolution, execute and deliver to your orator a deed or indenture of trust and mortgage, whereby it conveyed to your orator as trustee and to its successors or successor in said trust all and singular the line of railroad of the said original Ohio Central Railroad Company as the same then was or might thereafter be constructed from Toledo, in the county of Lucas, in the State of Ohio, through the counties of Lucas, Wood, Seneca, Wyandot, Crawford, Marion, Morrow, Delaware, Knox, Licking, Fairfield, and Perry, to the village of Corning, in said county of Perry, and from Bush's station, in said county of Fairfield, and Columbus, Franklin county, in the counties of Fairfield and Franklin, all in the State of Ohio, being about two hundred miles in length, together with all and singular the rights of way, road-bed, made or to be made, its track, laid or to be laid, between the terminal points aforesaid, and all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then appertaining or which might thereafter appertain unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures then or which might be at any time thereafter held, owned, or acquired by the said original Ohio Central Railroad Company for use in connection with its line of railroad aforesaid, and all its depot grounds, yards, sidings, turn-outs, sheds, machine shops, leasehold rights, and other terminal facilities then and or which might be thereafter owned by said original Ohio Central Railroad Company, together

with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be levied and derived therefrom, in trust, nevertheless, and for the uses and purposes in said indenture expressed. A copy of said deed of trust and mortgage is hereunto annexed, marked "Exhibit A," and made a part of
5 this bill. The said deed of trust or mortgage has been duly recorded in the offices of the recorders of the said several counties.

IV. Your orator further shows that subsequent to the 1st day of January, 1880, and to the execution and delivery of the bonds and mortgage hereinbefore described, the said original Ohio Central Railroad Company and the Atlantic and Northwestern Railroad Company, a corporation created and existing under and by virtue of the laws of the State of West Virginia, made and entered into an agreement of consolidation under and pursuant to the statutes of the States of Ohio and West Virginia, and thereby became consolidated under the name of the Ohio Central Railroad Company, and that the said consolidated corporation so formed thereupon became and ever since has been and still is a corporation under the laws of the said States of Ohio and West Virginia, having its principal office for the transaction of business at Toledo, in the State of Ohio, and is the corporation named as defendant in this suit; that by the terms of said agreement of consolidation, as well as by the provisions of the statutes of said States of Ohio and West Virginia, the said defendant, The Ohio Central Railroad Company, by virtue of said consolidation, became and was vested with all the property, rights, and franchises of said constituent companies, and assumed and became bound to pay all the debts and obligations of said several corporations, including the bonds and interest warrants hereinbefore set forth, and your orator craves leave to refer to the said agreement of consolidation upon the hearing of this cause.

V. Your orator further shows that on the first day of January, 1884, there became due and payable upon the said bonds a semi-annual instalment of the interest, evidenced by the interest warrants or coupons attached to said bonds, due on said last-mentioned day; that the said defendant, The Ohio Central Railroad Company wholly failed, omitted, and refused to pay the said semi-annual install-
6 ment of interest, or to pay the interest mentioned and provided for in the said interest warrants due on that day or any of them, but therein wholly made default; that a very large number of the said interest warrants or coupons representing said instalment of interest due and payable on said 1st day of January, 1884, were on said last-mentioned day or shortly thereafter, and prior to the filing of this bill, actually presented for payment at the place where the same are payable, to wit, the Metropolitan National Bank, in the city of New York, and payment thereof demanded, but that payment thereof was refused, whereby default was made in the performance by said defendant of the terms and provisions of said mortgage, and the conditions of said mortgage have become and are broken, and the said conveyance to your orator has become and is absolute.

VI. Your orator further shows that the said original Ohio Central Railroad Company, proper corporate action for that purpose having first been had, did, on or about the first day of January, 1880, after the due and complete execution of and in all respects subject to the deed of trust and mortgage hereinbefore set forth, execute and deliver to your orator as trustee a certain other deed of trust or mortgage, whereby it granted, bargained, sold, and conveyed unto your orator as trustee all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the mortgage first set forth in this bill, and the net income thereof, to secure the payment of a series of three thousand bonds for the principal sum of one thousand dollars each, issued by said original Ohio Central Railroad Company and known as its main line income bonds, and your orator prays leave to produce and refer to the said last-mentioned deed of trust or mortgage upon the hearing of this cause; that the same was recorded in each of the counties in which said first mortgage was recorded, so as to constitute a lien upon the railroad and property thereby conveyed subordinate to the lien of said first mortgage; that the said main-line income bonds were all duly authenticated by your orator as trustee and issued by said original Ohio Central Railroad Company; that the holders of said
7 income bonds are very numerous and unknown to your orator, and your orator alleges that the interest and lien, if any, of said income-bond holders and of your orator as their trustee upon the said mortgaged premises has accrued subsequent to and is subject to the lien of the said first mortgage made to your orator as trustee as aforesaid.

VII. Your orator further shows, upon information and belief, that the said mortgaged premises are insufficient to pay the said mortgage debts; that in addition to its bonded indebtedness the defendant, The Ohio Central Railroad Company, has a large floating debt; that some of the creditors of said defendant have commenced legal or equitable proceedings against the property of the defendant for the enforcement of their claims; that your orator has commenced a suit in this circuit — against the said defendant for the foreclosure of a certain mortgage upon a portion of the property of said defendant corporation not embraced or covered by the mortgages aforesaid, known as the "River Division" thereof, and that in said last-mentioned suit a receiver of the said River Division has been appointed by this honorable court, and that a multiplicity of suits, judgments, and liens will obstruct the operation of said railroad and cause great loss to the holders of bonds secured by the mortgages aforesaid and a sacrifice of the property of said defendant corporation.

VIII. Your orator further shows that no proceedings at law have been had nor any suit or action commenced by or on behalf of your orator or any holder of the bonds of said company secured by the mortgage of said main line for any interest unpaid or accrued thereon except only in this action.

Wherefore, and forasmuch as your orator is remediless in the premises at and by the rules of the common law, and can only have

relief in a court of equity, to the end, therefore, that the said defendant herein may be required to make answer to all and singular the matters hereinbefore stated and charged as fully and particu-
8 larly as if the same were here repeated and it thereunto particularly interrogated, but not under oath, an answer under oath being hereby expressly waived; that an account may be had and taken of the bonds secured by the said several mortgages of the said The Ohio Central Railroad Company and of the amount due on said first-mortgage bonds for principal and interest or either; that the names of the lawful holders thereof may be ascertained, and that an account may be taken also of all the liens and encumbrances upon the said railroad property, according to their respective priorities, and that said first mortgage to your orator may be decreed to be a first lien upon all the railroad and other property described therein; that the said mortgaged property may be sold at a judicial sale thereof, free from the claims of all parties hereto or of all persons whose interests are in any manner represented by any party hereto, under the judgment or decree of this honorable court, and upon such terms and conditions as to the court shall seem meet and proper; that said defendant and all other persons claiming or to claim by, from, or under it may from and by said sale be absolutely barred and foreclosed of and from all right and equity of redemption of, in, and to any and all of the property mentioned and described in this bill; that the said judgment or decree may contain such provisions for the ascertainment of the priorities of the said encumbrances and of the due application of the proceeds of such sale according to the rights of the parties as may be just and equitable; that pending this suit a receiver may be appointed, according to the course and practice of this court, with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises and the property, franchises, equitable interests, things in action, effects, moneys, receipts, bills, incomes, earnings, rights, privileges, and immunities of said company connected with or relating to said mortgaged premises, and of all the rolling stock, machinery, equipment, and other property incident to the same; that said railroad corporation may be ordered and directed to transfer and deliver to said receiver all the property, real and personal, and all contracts, records and papers, bills, books of
9 account, deeds, evidences, and muniments of title of or pertaining to said main line of said The Ohio Central Railroad Company, and that said receiver may be authorized and directed to maintain and operate said railroad and to keep the same in proper repair, and to receive, collect, and preserve all the property, assets, and income mentioned or described and included in said first mortgage of said Ohio Central Railroad Company, and that such other orders or directions may be made in respect to said receivership as may be equitable and proper; that an injunction may issue restraining the defendants and each of them from interfering with, transferring, selling, or disposing of any of the said mortgaged property, and from taking possession of, levying upon, or attempting to sell the same or any part thereof, and that your orator may have

such other or further relief as the nature of the case may require and to your honors seem meet—

May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said defendant, The Ohio Central Railroad Company, thereby commanding it, at a certain time and under a certain penalty therein to be named, to be and appear before your honors, in this honorable court, and then and there to answer all and singular the matters aforesaid (but not under oath), and to stand to, abide, and perform such other or further orders and decrees therein as to your honors shall seem meet.

T. E. STILLMAN,
SWAYNE, SWAYNE & HAYES,
Solicitors for Complainant.

10 UNITED STATES OF AMERICA,
South. District of New York, State of New York, County of New York, } *ss:*

Frederick P. Olcott, being duly sworn, says that he is the vice-president of The Central Trust Company of New York, the complainant in the above bill; that the said bill is true of his own knowledge except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

F. P. OLCOTT.

Sworn to before me this 5th day of Jan., 1884.

DANIEL A. O'CONNELL, [SEAL.]
Notary Public, N. Y. Co.

The Ohio Central Railroad Company, defendant herein, hereby enters it- appearance herein and waives the issue and service of subpœna on it. It also consents to the appointment of a receiver as prayed for.

THE OHIO CENTRAL RAILROAD COMPANY,
By H. L. TERRELL, *Its Solicitor.*

11 EXHIBIT "A" TO BILL.

"EXHIBIT A."

First-Mortgage Trust Deed.

Ohio Central Railroad Company to the Central Trust Company of New York.

First-mortgage, dated January 1, 1880, securing $3,000,000 six per cent. gold bonds.

This indenture, made and entered into this first day of January, A. D. one thousand eight hundred and eighty, by and between the Ohio Central Railroad Company, party of the first part, and the Central Trust Company of New York, party of the second part, as trustee, for the use and purposes hereinafter set forth, witnesseth:

Whereas the said party of the first part is a corporation duly created by and under the laws of the State of Ohio by virtue of a consolidation duly and lawfully entered into between the Columbus and Sunday Creek Valley Railroad Company of Ohio and the Ohio Central Railroad Company of Ohio; and

Whereas the party of the first part, by virtue of such con-
12 solidation, has become the owner of all and singular the line of railway, equipment, appendages, and franchises, hereinafter more particularly described, together with the franchises and powers to operate the same and levy and collect tolls thereon, all and singular with the [which] property and franchises are now in the possession and use of said party of the first part, and — is now engaged in completing and equiping its said railroad from Corning, Ohio, to Toledo, Ohio, and from Bush's station to Columbus, Ohio;

Whereas the said party of the first part has full authority and power under the laws of the State of Ohio to borrow money for the corporate purpose of building and making payment of the purchase-money for its said line of railroad, equipment, and appendages, and to enable it to carry out the objects of such consolidation contract, and complete, improve, still further equip, and operate its road, and has the further authority to issue its corporate bonds to effect such loan and secure the same by mortgage or deed of trust upon the entire property, franchises, and income of the said party of the first part; and

Whereas the board of directors of the said party of the first part did, at a regular meeting duly convened and held on the (29) twenty-ninth day of December, A. D. 1879, resolve that, for the purpose of borrowing money for the corporate purposes aforesaid, the said party of the first part should prepare, sign, seal, and negotiate a series of bonds, amounting in the aggregate to $3,000,000, in the form
13 following, except as to numbers and amounts, viz:

UNITED STATES OF AMERICA, *State of Ohio.*

Number —.	Total issue, $3,000,000.	Number —.
$1,000,000.	*First-Mortgage Gold Bond.*	$1,000,000.

The Ohio Central Railroad Company, a corporation existing under the laws of Ohio, for value received, promises to pay to the Central Trust Company of the City of New York, or bearer, the sum of one thousand dollars, in gold coin of the United States, of the present standard of weight and fineness, at the Metropolitan National Bank, in the city of New York, on the first day of January, in the year one thousand nine hundred and twenty, with interest, payable in like gold coin of the United States, at the rate of six per cent. per annum, on the first days of January and July of each year, on the surrender of the annexed interest warrants according to their tenor. The principal and interest of this bond is payable without relief from the valuation or appraisement laws and free from all United States taxes. This bond is one of a series of like date, tenor, and effect, amounting

in the aggregate to three million dollars, being 3,000 bonds of one thousand dollars each, numbered consecutively from 1 to 3000, inclusive, all such bonds being equally secured by a first mortgage upon all the line of railroad of said Ohio Central Railroad Company
14 from Toledo to Corning, Ohio, and from Bush's to Columbus, Ohio, about two hundred miles, together with all its property, equipment, appurtenances, and franchises. Such mortgage is of even date herewith, executed and delivered unto the Central Trust Company of the City of New York, as trustees, and has been duly recorded in each of the counties of Ohio where said line of railroad is situated. This bond shall pass by delivery or by transfer on the books of the said railroad company at its agency in the city of New York, and after any such registration of ownership on the books of such agency, duly certified on the back hereof by the transfer agent, no transfer hereof shall be valid or pass any title hereto unless made in writing upon the books of such agency, unless the last preceding transfer has been made to bearer, in which event this bond shall become thereby transferable by delivery. This bond shall continue subject to successive registrations and transfers to bearer as aforesaid at the option of any holder thereof in accordance with the above provisions. The holders of the bonds of this issue shall have the right to vote at any and all meetings of the stockholders of said railroad company, and for such voting purposes each one hundred dollars of the principal of this bond shall be taken as the equivalent of one share of the capital stock of said corporation and as such entitled to one vote. No bond of this series shall be valid or obligatory unless the same is duly authenticated by the certificate endorsed on the back thereof, duly executed by the
15 said Central Trust Company, as trustee.

In witness whereof the said Ohio Central Railroad Company has caused the foregoing to be attested by its president and secretary and its corporate seal to be attached this first day of January, in the year one thousand eight hundred and eighty.

[SEAL.] (Signed) DAN'L P. EELLS, *President.*

B. C. MITCHELL, *Secretary.*

With eighty coupons for the semi-annual interest to become due thereon in the following form to be attached thereto:

Coupon No. 1.

$30. $30.

On July 1st, 1880, the Ohio Central Railroad Company will pay the bearer thirty dollars in gold coin of the United States, of the present weight and fineness, at the Metropolitan National Bank, in the city of New York, being six months' interest on its first-mortgage bond No. —.

January 1st, 1880.

B. C. MITCHELL, *Secretary.*

Said coupons differing so as to express the amount, term, and

time of payment of each; such issue of bonds to be three thousand bonds of one thousand dollars each, being numbered Nos. 1 to 3000, both inclusive; and

Whereas it was further resolved by the said board of directors at such meeting that, in order to secure the payment of the
16 principal and interest of such issue of bonds, the said party of the first part should prepare, sign, seal, acknowledge, execute, and deliver a deed of trust or mortgage unto the party of the second part, as trustee, conveying all the present and in future to be acquired line of railway and branches, appurtenances, equipment, and income thereof between Corning, Ohio, and Toledo, Ohio, and between Bush's station and Columbus, Ohio, in trust as security for the payment of such issue of bonds and coupons; and

Whereas, at a meeting of the stockholders of the said party of the first part convened and held according to law on the (29) twenty-ninth day of December, 1879, at which meeting all of the stockholders of the said party of the first part were present, all and singular the acts and resolutions of the said board of directors of the said party of the first part were duly and fully ratified and confirmed, and it was, by a unanimous vote of all the stockholders of the party of the first part, then and there ordered and resolved that the above-described bonds and mortgages should be executed and delivered by the said party of the first part for its corporate uses and purposes aforesaid:

Now, therefore, under the authority and power aforesaid, in order to secure the payment of the principal and interest of said issue of three million dollars of bonds, and in consideration of the premises and the further payment by the party the second part unto the party of the first part of the sum of one dollar, the receipt of
17 which is hereby acknowledged, the Ohio Central Railroad Company have bargained, sold, granted, conveyed, and confirmed, and by these presents do bargain, grant, sell, convey, and confirm, unto the Central Trust Company of New York and to its successor or successors, in trust and for the uses and trusts hereby created, all and singular the line of railroad of the said party of the first part, as the same is or may hereafter be constructed, from Toledo, Lucas county, through the counties of Lucas, Wood, Seneca, Wyandot, Crawford, Marion, Morrow, Delaware, Knox, Licking, Fairfield, and Perry, to Corning, Perry county, and from Bush's station, Fairfield county, and Columbus, Franklin county, in the counties of Fairfield and Franklin, all in the State of Ohio, being about two hundred miles in length, together with all and singular the rights of way, road-bed, made or to be made, its track, laid or to be laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures now or at any time hereafter held, owned, or acquired by the said party of the first part for use in connection with its line of railroad aforesaid, and all its depot grounds, yards, sidings, turn-outs, sheds, machine shops, leasehold rights, and other terminal facilities now or here-

after owned by the said party of the first part, together with
18 all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be levied and derived therefrom:

Provided, however, and this indenture is upon the express condition, that whenever any of the lands or property belonging to the said party of the first part and covered by this mortgage are no longer necessary or convenient for use in connection with said line of railroad the said party of the first part shall have the right to sell and convey the same, on such terms as it pleases, free from the lien of these presents; and, on demand, the said party of the second part shall release the lien of this mortgage upon all the lands so conveyed, but the proceeds of such sale shall be subject to the lien hereby created:

To have and to hold the said granted premises unto the said party of the second part and its successors forever, in trust, nevertheless, and for the uses and purposes in this indenture expressed—that is to say:

First. If the interest due on any of the above-described issue of bonds and hereby secured shall not be paid by the said party of the first part when the same becomes due and shall so remain in arrears for six months after it is actually demanded at the place where the same is payable, as specified by the coupons given to evidence such interest, or in case the principal of said bonds or any of them shall not be paid at their maturity, then it shall be lawful for the said party of the second part, or its successor in said trust
19 for the time being, and it shall be the duty of such trustee, upon the request in writing so to enter of the holders of not less than one-half of the then outstanding bonds of the issue hereby secured, and upon receiving satisfactory indemnity, to forthwith demand, enter, take, and maintain possession of all and singular the railroad, premises, and franchises hereby conveyed, and as the attorney-in-fact or agent of said party of the first part, by itself and agents or substitutes duly constituted, have, use, manage, operate, and enjoy the same and each and every part thereof to as full an extent as the said party of the first part might lawfully do, and shall make from time to time all needed repairs, alterations, and additions thereto and receive all the tolls, income, and revenue thereof, and, after deducting the expenses of such use, operation, reasonable repairs, alterations, and additions and the costs and charges of such taking possession and a fair compensation for the service of such trustee for such taking possession and management while in possession, the said party of the second part or its successor for the time being shall apply the remaining income and revenue arising from the use of said mortgaged property and coming to its hand to the payment of the interest in default and maturing from time to time, satisfying the said coupons in the order of their several maturities, and thereafter apply the residue upon the principal of said then outstanding bonds.

Second. And upon further trust that if a six months' default

shall occur in the payment either of principal or interest of
20 any of the bonds hereby secured, after such actual demand as aforesaid, then it shall be lawful for the said party of the second part or said trustee for the time being, and upon the written request of the holders of a majority in amount of said bonds then outstanding, and upon receiving satisfactory indemnity, it shall, with or without entry as aforesaid, cause all and singular the said premises, railway, appurtenances, equipment, and franchises hereby conveyed or to be — sold as an entirety, at public auction, to the highest and best bidder, at the city of Toledo, Ohio, after giving at least sixty days' notice of the time, places, and terms of sale by advertisement in a newspaper of general circulation in the city of New York, and on such sale said party of the second part or the trustee for the time being shall make, execute, acknowledge, and deliver unto the purchaser or purchasers thereof a good and sufficient deed in fee simple, conveying the said railroad property and franchise so sold, which conveyance shall be perpetual bar in law and equity against the said party of the first part, its successors and assigns, and all persons claiming or to claim under them, of all right, title, interest, or claim in or to the said premises and franchises or any part thereof.

The said party of the second part, deducting from the proceeds of sale the costs and expenses thereof and a reasonable compensation to said trustee and its attorneys and agents for services in
21 connection therewith, shall apply so much of the proceeds as may be necessary to the ratable payment of principal and the then accrued interest of all the said bonds, whether the principal be then due or not; and if any proceeds of such sale remain in its hands after the full payment of the principal and accrued interest of all said bonds, then it shall render and pay over the same unto the party of the first part or its successors or assigns.

Third. In case any such taking possession or proceeding to sell the mortgaged premises for default of payment of interest of the said party of the first part before the said bonds shall become due and before such sale shall be made, shall pay and satisfy all interest then in arrears on all outstanding bonds, and shall also pay and discharge all costs, expenses, and disbursements and reasonable compensation incurred by reason of such default on possession, then, upon evidence thereof to its satisfaction, the said party of the second part shall thereupon discontinue such proceeding and restore possession of the mortgaged premises to the party of the first part, to be thereafter held, subject to these presents, in like manner as if default or entry had not occurred.

Fourth. The said party of the first part covenants and agrees that it will, on demand, from time to time hereafter, execute, acknowledge, and deliver unto the said party of the second part any and all such further and other conveyances and assignments as may be necessary and proper to fully convey to and vest in the party of the second part or the trustee for the time being all such future-acquired
22 depots, grounds, estates, equipment, and property as it may

hereafter from time to time purchase for use in and upon its said line of railroad and intended to be hereby conveyed.

And the said party of the first part doth still further agree that it will, in case of any default in the payment by it, either of the principal or interest of any of its bonds hereby secured, forthwith, upon demand of the party of the second part or the trustee for the time being, surrender the full and peaceable possession of all and singular the premises hereby conveyed or intended to be, including all the real and personal property by it acquired subsequent to the date of these presents for use in connection with its said line of railroad, and will also surrender all books of account, records, and papers used by it in and about the operation thereof; and it further agrees that it will not, in case of any such demand, entry, or sale, make any resistance or delay thereto, or make any application for an injunction or other legal process to stay such proceedings.

Fifth. It is especially agreed that all of the said bonds to be issued hereunder shall be upon an equality, so far as regards security for the payment thereof by these presents, notwithstanding the same may be issued at different times, it being intended that this indenture shall operate as a security for all said bonds equally, ratably, and without preference, whether issued at the same or different times.

23 Sixth. It is agreed that each of the bonds hereby secured shall pass by delivery or by transfer on the books of the party of the first part, at its agency, in the city of New York, after a registration of ownership in such books and duly certified on the back of any such bond by the transfer agent of the party of the first part.

No transfer thereof shall be valid unless made upon the said books unless the last transfer has been to bearer, in which event such bond may continue to be transferable by delivery.

Any such bonds shall continue subject to such successive registration and transfers to bearer at the option of the owner.

Any such registered owner of such bonds shall be entitled to vote at any stockholders' meeting of the party of the first part at the rate of one vote for each one hundred dollars of principal of the bonds so standing in his name on such registry.

Seventh. This trust and the security hereby intended shall only extend to such bonds of this issue as shall be certified by said trustee; and when all said bonds and interest thereon shall be paid or discharged the trust hereby created shall cease and the estate hereby granted to the party of the second part shall determine and become extinct, and the full right and title to all the premises hereby conveyed shall revert to and revest in said party of the first part without any further or other acknowledgment, satisfaction, reconveyance, re-entry, or other act.

24 And it is further agreed that until such default and demand as aforesaid the party of the first part shall have the right to maintain, keep, and hold possession of all and singular the property and franchises hereby granted, the same manage, and enjoy the rents, income, and revenues thereof.

Eighth. It is mutually agreed that the said party of the second

part and its successor or successors in the trust hereby created shall only be accountable for reasonable diligence in the management thereof and shall not be responsible for the acts, omissions, or defaults of any agent employed by them, and that the said party of the second part or any successor in said trust shall be entitled to demand, receive, and retain proper compensation for every labor or service performed and expense, disbursement, and damage incurred by it or them in the discharge of this trust in case of default or taking possession or sale of the premises, and that it or they shall not be liable in any manner for any loss or damage which may happen unless the same be occasioned by its or their gross neglect or willful malfeasance.

In case the said trust shall become vacant by reason of the dissolution, incapacity, removal, or resignation of the said party of the second part, or any successors, it shall be lawful for the holders of the majority in amount of the bonds then outstanding to appoint a successor by a writing by them signed, or for any court of record in any county through which said line of railroad runs to appoint such successor on the nomination of not less than the holders of five hundred thousand dollars in said bonds then outstanding.

And upon such appointment being made and the said trust being accepted any such successor or substituted trustee shall, without further act or deed, become vested with all and singular the estate, rights, and powers and shall perform all the duties of trustee in like manner and with the same effect as if it or he had been named in this instrument as trustee.

In witness whereof the Ohio Central Railroad Company, by order of its board of directors, has hereto affixed its corporate seal and caused the same to be signed by its president and attested by its secretary, and the said trustee has hereto set the hand of its president and affixed its seal the day and year first above written.

(Signed) DAN. P. EELLS, *President.*
(Signed) H. F. SPAULDING, *President.*

(Signed) B. G. MITCHELL, *Secretary.*
C. H. P. BABCOCK, *Secretary.*

STATE OF OHIO, }
County of Franklin, } *ss:*

Before me, the undersigned, a notary public in and for the said State and county, personally came this day Dan. P. Eells, president of the Ohio Central Railroad Company, personally known to me to be the president of said company and whose name is subscribed to the foregoing instrument, and acknowledged that he, in behalf of said railroad company, had signed and delivered the said instrument as the free and voluntary act of the said railroad company and himself and for the uses and purposes therein set forth.

Witness my hand and official seal, at Columbus, this first day of January, A. D. 1880.

F. F. D. ALBERRY,
Notary Public, Franklin County, O.

27 STATE OF NEW YORK, } ss:
City and County of New York, }

Before me, the undersigned, a notary public in the city of New York, personally came this day Henry F. Spaulding, president, and C. H. P. Babcock, secretary, of the Central Trust Company of New York, trustee named in the foregoing mortgage and deed of trust, and personally known to me to be the persons who signed the same, who acknowledged that they did sign, seal, and execute the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto affixed my notarial seal this — day of January, anno Domini 1880.

—— ——.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, —— ——, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that —— ——, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commis-
28 sioned and sworn, and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the — ——, A. D. 1880.

[SEAL.] —— ——, *Clerk.*

I, —— ——, secretary of the Ohio Central Railroad Company, do hereby certify that at a special meeting of the stockholders of said corporation, duly called and held according to law, that the entire share capital was represented, and by the unanimous vote of all the stockholders the following resolve was passed:

"Resolved, That the stockholders of the Ohio Central Trust Company, duly assembled according to the law for such purpose, do hereby direct and authorize the president and directors of such corporation, and for its corporate uses, to prepare, execute, and issue a series of three thousand bonds, of one thousand dollars each, bearing six per cent. interest, payable semi-annually, the principal to be-
come due in forty years, and both principal and interest to
29 be payable in gold coin of the United States, of its present weight and fineness, and free of United States taxes.

"Such bonds shall also provide for voting power at stockholders' meetings, and the payment of such bonds and interests shall be secured by a mortgage or deed of trust giving a first lien upon all the property, real and personal, of this railway company and its franchises and income, to be drawn in such form and to such trustee as the board of directors shall designate."

Witness my hand and the seal of said corporation, hereto affixed this first day of January, A. D. 1880.

—— ——, *Secretary.*

STATE OF OHIO, } ss:
Lucas County, }

The foregoing deed was filed for record in the recorder's office of Lucas county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Lucas County.

STATE OF OHIO, } ss:
Wood County, }

The foregoing deed was filed for record in the recorder's office of Wood county on the — day of ——, A. D. 1880, at — o'clock
30 —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Wood County.

STATE OF OHIO, } ss:
Seneca County, }

The foregoing deed was filed for record in the recorder's office of Seneca county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Seneca County.

STATE OF OHIO, } ss:
Wyandot County, }

The foregoing deed was filed for record in the recorder's office of Wyandot county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Wyandot Co.

31 STATE OF OHIO, } ss:
Crawford County, }

The foregoing deed was filed for record in the recorder's office of Crawford county on the — day of ——, A, D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Crawford County.

STATE OF OHIO, }
Marion County, } ss:

The foregoing deed was filed in the recorder's office of Marion county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Marion County.

STATE OF OHIO, }
Morrow County, } ss:

The foregoing deed was filed for record in the recorder's office of Morrow county on the — day of ——, A. D. 1880, at —. o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Morrow County.

32 STATE OF OHIO, }
Delaware County, } ss:

The foregoing deed was filed for record in the recorder's office of Delaware county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Delaware County.

STATE OF OHIO, }
Knox County, } ss:

The foregoing deed was filed for record in the recorder's office of Knox county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Knox County.

STATE OF OHIO, }
Licking County, } ss:

The foregoing deed was filed for record in the recorder's office of Licking county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Licking County.

33 STATE OF OHIO, }
Fairfield County, } ss:

The foregoing deed was filed for record in the recorder's office of Fairfield county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Fairfield County.

STATE OF OHIO, }
Perry County, } ss:

The foregoing deed was filed for record in the recorder's office of

Perry county on the — day of ——, A. D. 1880, at — o'clock —. m., and duly recorded in Book —, on page —.

——— ———,
Recorder of Perry County.

STATE OF OHIO, }
Franklin County, } *ss:*

The foregoing deed was filed in the recorder's office of Franklin county on the — day of ——, A. D. 1880, at — o'clock —., and duly recorded in Book —, on page —.

——— ———,
Recorder of Franklin County.

34 Afterwards, to wit, on the 2nd day of June, A. D. 1884, the following decree *pro confesso* was duly entered on the chancery order book of said court, to wit:

Decree Pro Confesso.

THE CENTRAL TRUST COMPANY OF NEW YORK }
vs. } No. 494.
THE OHIO CENTRAL TRUST COMPANY. }

It appearing to the court in this cause that the defendant, though duly served with process, has failed to plead, answer, or demur to the bill of complaint herein filed, it is therefore, on motion of complainant's solicitors, ordered that said bill of complaint be taken as confessed by said defendant, and that a decree *pro confesso* be entered against said defendant and in favor of said complainant according to the prayer of said bill.

35 Afterwards, to wit, on the 10th day of December, A. D. 1884, the following decree was entered on the journal of said court, to wit:

Decree.

At a stated term of the circuit court of the United States for the northern district of Ohio, western division, held at the court-rooms, in the city of Toledo, on the second day of December, 1884.

Present: The Hon. John Baxter, circuit judge, and Hon. Martin Welker, district judge.

THE CENTRAL TRUST CO. OF NEW YORK }
against } In Equity. No. 394.
THE OHIO CENTRAL RAILROAD COMPANY. }

This cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, decreed, and adjudged as follows, namely:

The court finds from the pleadings, exhibits, and evidence, that the complainant herein, The Central Trust Company of New York,

is and was at the several times in the bill of complaint herein mentioned a corporation duly organized and existing under the laws of the State of New York, and that the Ohio Central Railroad Company was at the several times mentioned in the said bill of
36 complaint, and on and prior to January 1, 1880, a corporation created by and existing under and by virtue of the laws of the State of Ohio, having its principal office for the transaction of business in the city of Toledo, in said State of Ohio.

And the court further finds that heretofore, to wit, on or about the 1st day of January, 1880, the said Ohio Central Railroad Company did, in pursuance of the proper corporate authority therefor, make and execute its three thousand bonds, each for the sum of one thousand dollars, bearing date January 1st, 1880, payable in gold coin of the United States, on the 1st day of January, 1920, at the Metropolitan National Bank, in the city of New York, with interest thereon at the rate of six per cent. per annum, payable in like gold coin, semi-annually, on the first days of January and July in each year, at said last-mentioned place, on the surrender of the interest warrants annexed to said bonds according to their tenor.

And the court further finds that the said Ohio Central Railroad Company did issue, deliver, and sell, or caused to be issued, delivered, and sold, a large number, to wit, three thousand, of said bonds, with interest warrants or coupons for the payment of said interest thereto attached, and duly authenticated by the complainant herein, and that said bonds are now outstanding in the hands of divers persons as holders thereof.

And the court further finds that, in order to secure the payment of the principal and interest of said issue of three thousand bonds as the same should mature, the said Ohio Central Railroad
37 Company did, on or about said 1st day of January, 1880, in pursuance of proper corporate authority, execute and deliver to the complainant herein, The Central Trust Company of New York, a certain deed or indenture of trust and mortgage dated on said last-mentioned day, and that thereby said Ohio Central Railroad Company did convey unto the complainant herein, as trustees, and to its successors or successor in said trust, all and singular the line of railroad of said Ohio Central Railroad Company as the same was or might thereafter be constructed from Toledo, in the county of Lucas, in the State of Ohio, through the counties of Lucas, Wood, Seneca, Wyandot, Crawford, Marion, Morrow, Delaware, Knox, Licking, Fairfield, and Perry to the village of Corning, in said county of Perry, and from Bush's station, Fairfield county, and Columbus, Franklin county, in the counties of Fairfield and Franklin, all in the State of Ohio, being about two hundred miles in length; together with all and singular the rights of way, road-bed made or to be made, its tracks laid or to be laid, between the terminal points aforesaid, and all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then appertaining or which might thereafter appertain unto said described line of railroad; together with all the engines, cars, machinery, supplies, tools, and fixtures then or which might be at

any time thereafter held, owned, or acquired by the said Ohio Central Railroad Company for use in connection with its line of railroad aforesaid; and all its depot grounds, yards, sidings, turn-outs, sheds, machine shops, leasehold rights, and other terminal facilities then or which might be thereafter owned by said Ohio Central Railroad Company; together with all and singular the power and fran-
38 chises thereto belonging, and the tolls, income, and revenue to be levied and derived therefrom; that said deed of trust or mortgage was duly recorded in the offices of the recorders of the said several counties wherein said railroad and property were and are situated so as to be and to constitute a first and paramount lien upon the mortgaged premises and property therein mentioned and described.

And the court further finds that subsequent to the 1st day of January, 1880, and after the execution and delivery of the said bonds and mortgage, the said Ohio Central Railroad Company and the Atlantic & Northwestern Railroad Company, a corporation created and existing under the laws of the State of West Virginia, made and entered into an agreement of consolidation under and pursuant to the statutes of the States of Ohio and West Virginia, and thereby became consolidated under the name of the Ohio Central Railroad Company, and that the said consolidated company so formed thereupon became and was at the time of the commencement of this suit and ever since has been and still is a corporation under the laws of said States of Ohio and West Virginia, having its principal office for the transaction of business at Toledo, Ohio, and is the corporation defendant in this suit; that by the terms of said agreement of consolidation, as well as by the provisions of the statutes of the said States of Ohio and West Virginia, the said defendant, The Ohio Central Railroad Company, by virtue of said consolidation, became and was vested with all the property, rights, and franchises of said constituent companies and assumed and became bound to pay all the debts and obligations of said several corporations, including the said bonds and interest warrants.

39 And the court further finds that on the 1st day of January, 1884, there became due and payable upon the said bonds a semi-annual installment of the interest evidenced by the interest warrants or coupons attached to said bonds due on said last-mentioned day; that the said defendant, The Ohio Central Railroad Company, wholly failed, omitted, and refused to pay the said semi-annual installment of interest evidenced by the said interest warrants due on that day or any thereof, but therein wholly made default; that a very large number of the said interest warrants or coupons representing the said installment of interest due and payable on said 1st day of January, 1884, were, on said last-mentioned day or shortly thereafter and prior to the filing of the bill of complaint in this suit, actually presented for payment at the place where the same were payable, to wit, the Metropolitan National Bank, in the city of New York, and payment thereof demanded, but that payment thereof was refused, and that thereby default was made in the performance of the terms and provisions of said mortgage.

And the court further finds that since the 1st day of January, 1884, the interest warrants or coupons on said bonds, payable on July 1, 1884, have fallen due and that the same have ever since remained and now are due and unpaid.

And the court further finds that the said interest now in arrear and due by and from the said The Ohio Central Railroad Company on the bonds aforesaid amounts to one hundred and eighty thousand dollars in gold coin of the United States, with interest at the rate of six per cent. per annum on ninety thousand dollars, a part of said sum, from January 1, 1884, and like interest on ninety thousand dollars, a part of said sum, from July 1, 1884.

And the court further finds that the said Ohio Central Railroad Company, proper corporate authority for that purpose having first been had, did, on or about said 1st day of January, 1880, after the due and complete execution of and in all respects subject to the first mortgage hereinbefore described, execute and deliver to the complainant herein, as trustee, a certain other deed or indenture of mortgage whereby it granted, bargained, sold, and conveyed unto said complainant, as trustee, all the railroad property, rights, franchises, goods, and chattels described or mentioned in the said first mortgage, and the net income thereof, to secure the payment at maturity of the principal of three thousand bonds of said Ohio Central Railroad Company for the sum of one thousand dollars each, known as main line income bonds, and such interest upon said bonds as might become due thereon according to the terms thereof and of said last-mentioned indenture of mortgage; that said last-mentioned mortgage was duly recorded in the several counties in which said first mortgage was recorded, and that the same is a second lien or mortgage upon the railroad and property thereby conveyed.

And the court further finds that three thousand of said bonds last mentioned, secured by said income mortgage, were authenticated by the complainant herein as trustee, and were issued and disposed of by said Ohio Central Railroad Company, and are now in the hands of divers persons as owners thereof, and that the principal of said income bonds is a second lien upon the railroad and property aforesaid.

And the court further finds that the consolidation aforesaid was subject and subordinate to the rights of the holders of the bonds and interest warrants secured by the several mortgages hereinbefore mentioned and without prejudice to the right to sell the said property by virtue of the said respective mortgages.

And the court further finds that by reason of the said default of the said The Ohio Central Railroad Company to pay the said interest due on said first-mortgage bonds on the 1st day of January, 1884, the condition of said deed of trust and mortgage, hereinbefore mentioned, made by the Ohio Central Railroad Company to the complainant herein, dated January 1, 1880, and known as the "main-line first mortgage," has been broken, and the said mortgage or deed of trust has become absolute, and the complainant herein is entitled to a decree for the sale of all the said mortgaged property

to satisfy the principal and interest of said bonds secured by said main-line first mortgage.

It is therefore considered, adjudged, and decreed that the said defendant, The Ohio Central Railroad Company, shall, within thirty days from this date, pay into this court, for the use and benefit of the holders of the unpaid coupons of said main-line first-mortgage bonds of said Ohio Central Railroad Company, dated January 1st, 1880, the sum of one hundred and eighty thousand dollars in gold coin of the United States, with interest at the rate of six per cent. per annum from January 1, 1884, till paid on ninety thousand dollars, a part of said sum, and like interest from July 1, 1884, till paid on ninety thousand dollars, also a part of said sum; and
42 also that within the same time it pay into this court a sum of money sufficient to defray the costs of this case, to wit, the sum of twenty-five thousand dollars, to be applied to the payment of the costs, charges, and expenses of the complainant herein in this behalf.

And it is further considered, adjudged, and decreed that in default of such payment within said time by the defendant herein or any holder of bonds secured by said income mortgage all equity of redemption of the said defendant, The Ohio Central Railroad Company, and of all parties to this suit, including the holders of the said income bonds, of, in, and to the said mortgaged premises, property, rights, assets, and franchises and of every part and parcel thereof described or embraced in said main-line first mortgage and in said bill of complaint, to which reference is now had for that purpose, fully described, including all property embraced within the terms of said mortgage acquired by said The Ohio Central Railroad Company and said Ohio Central Railroad Company since the date of said mortgage, shall be barred and foreclosed, and that in default of said payments or any of them all said mortgaged premises and property—real, personal, or mixed—rights, and franchises be sold upon proper order of sale, to be issued in the manner and upon the terms hereinafter directed. Said property shall be sold as an entirety, without appraisement, at public auction, at 12 m., in the room of the United States circuit court in the Toledo Produce Exchange building, on Madison street, in the city of Toledo, county of Lucas and State of Ohio, on a day to be named by the commissioner herein appointed in his advertisement of sale, and previous notice of the time and place of said sale shall be given by publication,
43 beginning not less than sixty days prior to the time of said sale and to be repeated weekly until the sale, in two newspapers of general circulation, one published in the city of Toledo and the other in the city of New York. The said commissioner making such sale shall accept no bid from any bidder of a less sum than one million dollars, or from any bidder who shall not first place in his hands, or deposit with him as a pledge that the latter will make good his bid in case of its acceptance by the court, the sum of fifty thousand dollars in money or said main-line first-mortgage bonds of January 1, 1880, to the amount of two hundred thousand dollars, exclusive of interest.

And it is further ordered that of the purchase price so bid not less than the sum of twenty-five thousand dollars shall be paid in cash, and also such further portions of said purchase price shall be paid in cash as this court may in this case from time to time direct, in order to meet claims which this court may adjudge in this case to be prior in equity to such main-line first mortgage, the court reserving the right to resell in this case said premises and property upon failure to comply within twenty days of any order of the court in that regard, and the balance of said purchase price not required to be paid in cash may be paid either in cash or the purchaser at said sale shall have the right to satisfy said remainder of his bid, in whole or in part, by paying over and surrendering said main-line first-mortgage bonds and overdue and unpaid coupons belonging thereto, at such price or value as would be equivalent to the distributive amount that the holders thereof would be entitled to receive thereon in case the entire amount of the bid were paid in cash.

44 It is further ordered that the fund to arise from said sale shall be applied as follows:

1st. To the payment of the costs of this suit, and also the compensation to complainant herein for its services, charges, and expenses, including its counsel fees, in the execution of said trust and all proper expenses of sale.

2d. To the payment of any claims which have been or may be adjudged by the court to have priority over said main-line first mortgage.

3d. To the payment of the coupons on said main-line first-mortgage bonds of the Ohio Central Railroad Company of date of January 1, 1880, which became due and payable January 1st, 1884, and July 1st, 1884, or which may become due prior to the distribution of the proceeds of said sale, with interest accrued and to accrue to the holders of said coupons.

4th. To the payment of the principal of said main-line first-mortgage bonds of January 1st, 1880.

5th. The surplus, if any, to be paid into this court, subject to its further order in this respect.

Wilbur F. Goodspeed, Esq., is hereby designated and directed as a special master commissioner to make the sale hereby decreed, and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof.

And it is further adjudged and decreed that the purchaser
45 or purchasers of the property herein ordered to be sold shall be invested with and shall hold, possess, and enjoy the said mortgaged premises and property herein directed to be sold, and all the rights, privileges, and franchises appertaining thereto, as fully and completely as the said The Ohio Central Railroad Company, defendant herein, now holds and enjoys, or at the time of the commencement of this suit held and enjoyed, or is or was entitled to hold or enjoy the same; and, further, that said purchaser or purchasers shall have and be entitled to hold said railroad and property free and discharged from the lien or encumbrance of the said

several and respective mortgages or deeds of trust mentioned in the bill of complaint in this suit and from the claims of all parties to this suit, to wit, (1) the mortgage or deed of trust made by said Ohio Central Railroad Company to the complainant herein, dated January 1, 1880, to secure said main-line first-mortgage bonds of said railroad company to the amount of three million dollars; (2) that certain mortgage or deed of trust made by said Ohio Central Railroad Company to the complainant herein, dated January 1, 1880, to secure the payment of the second-mortgage or income bonds set forth in the bill of complaint herein, amounting to three million dollars; (3) all the claims of each and every party to this suit or of all persons whose interests are in any manner represented by any party to this suit.

And this cause is now adjourned for further consideration.

46 Afterwards, to wit, on the 4th day of February, 1885, the following order of sale was issued in the above-entitled cause, to wit:

Order of Sale.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } *ss:*

The President of the United States of America to Wilbur F. Goodspeed, special master commissioner:

Whereas at a term of the circuit court of the United States for the northern district of Ohio, western division, in the sixth circuit, begun and held, at the city of Toledo, in said district and division, on the first Tuesday in the month of December, being the second day of that month, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth—present, the Honorables John Baxter, circuit judge, and Martin Welker, district judge—among the proceedings then and there had were the following, to wit, on the tenth day of December, A. D. 1884:

47 THE CENTRAL TRUST CO. OF NEW YORK
against
THE OHIO CENTRAL RAILROAD COMPANY. } In Equity. No. 394.

This cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, decreed, and adjudged as follows, namely:

The court finds from the pleadings, exhibits, and evidence that the complainant herein, the Central Trust Company of New York, is and was at the several times in the bill of complaint herein mentioned a corporation duly organized and existing under the laws of the State of New York, and that the Ohio Central Railroad Company

48 was at the several times mentioned in the said bill of complaint, and on and prior to January 1, 1880, a corporation created by and existing under and by virtue of the laws of

the State of Ohio, having its principal office for the transaction of business in the city of Toledo, in said State of Ohio.

And the court further finds that heretofore, to wit, on or about the 1st day of January, 1880, the said Ohio Central Railroad Company did, in pursuance of the proper corporate authority therefor, make and execute its three thousand bonds, each for the sum of one thousand dollars, bearing date January 1st, 1880, payable in gold coin of the United States, on the 1st day of January, 1920, at the Metropolitan National Bank, in the city of New York, with interest thereon at the rate of six per cent. per annum, payable in like gold coin, semi-annually, on the first days of January and July in each year, at said last-mentioned place, on the surrender of the interest warrants annexed to said bonds, according to their tenor.

And the court further finds that the said Ohio Central Railroad Company did issue, deliver, and sell, or cause to be issued, delivered, and sold, a large number, to wit, three thousand, of said bonds, with interest warrants or coupons for the payment of said interest thereto attached, and duly authenticated by the complainant herein, and that said bonds are now outstanding in the hands of divers persons as holders thereof.

And the court further finds that, in order to secure the payment of the principal and interest of said issue of three thousand bonds as the same should mature, the said Ohio Central Railroad Company did, on or about said 1st day of January,
49 1880, in pursuance of proper corporate authority, execute and deliver to the complainant herein, The Central Trust Company of New York, a certain deed or indenture of trust and mortgage dated on said last-mentioned day, and that thereby said Ohio Central Railroad Company did convey unto the complainant herein, as trustees, and to its successors or successor in said trust all and singular the line of railroad of said Ohio Central Railroad Company as the same was or might thereafter be constructed from Toledo, in the county of Lucas, in the State of Ohio, through the counties of Lucas, Wood, Seneca, Wyandot, Crawford, Marion, Morrow, Delaware, Knox, Licking, Fairfield, and Perry, to the village of Corning, in said county of Perry, and from Bush's Station, Fairfield county, and Columbus, Franklin county, in the counties of Fairfield and Franklin, all in the State of Ohio, being about two hundred miles in length, together with all and singular the rights of way, road-bed made or to be made, its track laid or to be laid, between the terminal points aforesaid, and all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way then appertaining or which might thereafter appertain unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures then or which might be at any time thereafter held, owned, or acquired by the said Ohio Central Railroad Company for use in connection with its line of railroad aforesaid, and all its depot grounds, yards, sidings, turn-outs, sheds, machine shops, leasehold rights, and other terminal facilities then or which might be there-

after owned by said Ohio Central Railroad Company, to-
50 gether with all and singular the power and franchises thereto belonging and the tolls, income, and revenue to be levied and derived therefrom; that said deed of trust or mortgage was duly recorded in the offices of the recorders of the said several counties wherein said railroad and property were and are situated so as to be and to constitute a first and paramount lien upon the mortgaged premises and property therein mentioned and described.

And the court further finds that subsequent to the 1st day of January, 1880, and after the execution and delivery of the said bonds and mortgage, the said Ohio Central Railroad Company and the Atlantic & Northwestern Railroad Company, a corporation created and existing under the laws of the State of West Virginia, made and entered into an agreement of consolidation under and pursuant to the statutes of the States of Ohio and West Virginia, and thereby became consolidated under the name of the Ohio Central Railroad Company, and that the said consolidated company so formed thereupon became and was at the time of the commencement of this suit and ever since has been and still is a corporation under the laws of said States of Ohio and West Virginia, having its principal office for the transaction of business at Toledo, Ohio, and is the corporation defendant in this suit; that by the terms of said agreement of consolidation, as well as by the provisions of the statutes of the said States of Ohio and West Virginia, the said defendant, The Ohio Central Railroad Company, by virtue of said consolidation, became and was vested with all the property, rights, and franchises of said constituent companies, and assumed and became bound to pay all the debts and obligations of said several corporations, including the said bonds and interest warrants.

51 And the court further finds that on the 1st day of January, 1884, there became due and payable upon the said bonds a semi-annual installment of the interest evidenced by the interest warrants or coupons attached to said bonds, due on said last-mentioned day; that the said defendant, The Ohio Central Railroad Company, wholly failed, omitted, and refused to pay the said semi-annual installment of interest evidenced by the said interest warrants due on that day, or any thereof, but therein wholly made default; that a very large number of the said interest warrants or coupons representing the said installment of interest due and payable on said 1st day of January, 1884, were, on said last-mentioned day or shortly thereafter and prior to the filing of the bill of complaint in this suit, actually presented for payment at the place where the same were payable, to wit, the Metropolitan National Bank, in the city of New York, and payment thereof demanded, but that payment thereof was refused, and that thereby default was made in the performance of the terms and provisions of said mortgage.

And the court further finds that since the 1st day of January, 1884, the interest warrants or coupons on said bonds payable on July 1, 1884, have fallen due, and that the same have ever since remained and now are due and unpaid.

And the court further finds that the said interest now in arrear

and due by and from the said The Ohio Central Railroad Company on the bonds aforesaid amounts to one hundred and eighty thousand dollars in gold coin of the United States, with interest at the rate of six per cent. per annum on ninety thousand dollars,
52 a part of said sum, from January 1, 1884, and like interest on ninety thousand dollars, a part of said sum, from July 1, 1884.

And the court further finds that the said Ohio Central Railroad Company, proper corporate authority for that purpose having first been had, did, on or about said 1st day of January, 1880, after the due and complete execution of and in all respects subject to the first mortgage hereinbefore described, execute and deliver to the complainant herein, as trustee, a certain other deed or indenture of mortgage, whereby it granted, bargained, sold, and conveyed unto said complainant, as trustee, all the railroad property, rights, franchises, goods, and chattels described or mentioned in the said first mortgage, and the net income thereof, to secure the payment at maturity of the principal of three thousand bonds of said Ohio Central Railroad Company for the sum of one thousand dollars each, known as main-line income bonds, and such interest upon said bonds as might become due thereon according to the terms thereof and of said last-mentioned indenture of mortgage; that said last-mentioned mortgage was duly recorded in the several counties in which said first mortgage was recorded, and that the same is a second lien or mortgage upon the railroad and property thereby conveyed.

And the court further finds that three thousand of said bonds last mentioned, secured by said income mortgage, were authenticated by the complainant herein as trustee, and were issued and disposed of by said Ohio Central Railroad Company, and are now in the hands of divers persons as owners thereof, and that the principal of said income bonds is a second lien upon the railroad and property aforesaid.

53 And the court further finds that the consolidation aforesaid was subject and subordinate to the rights of the holders of the bonds and interest warrants secured by the several mortgages hereinbefore mentioned and without prejudice to the right to sell the said property by virtue of the said respective mortgages.

And the court further finds that by reason of the said default of the said The Ohio Central Railroad Company to pay the said interest due on said first-mortgage bonds on the 1st day of January, 1884, the condition of said deed of trust and mortgage, hereinbefore mentioned, made by the Ohio Central Railroad Company to the complainant herein, dated January 1, 1880, and known as the "main-line first mortgage," has been broken, and the said mortgage or deed of trust has become absolute, and the complainant herein is entitled to a decree for the sale of all the said mortgaged property to satisfy the principal and interest of said bonds secured by said main-line first mortgage.

It is therefore considered, adjudged, and decreed that the said defendant, The Ohio Central Railroad Company, shall within thirty

days from this date pay into this court for the use and benefit of the holders of the unpaid coupons of said main-line first-mortgage bonds of said Ohio Central Railroad Company, dated January 1st, 1880, the sum of one hundred and eighty thousand dollars in gold coin of the United States, with interest at the rate of six per cent. per annum from January 1, 1884, till paid, on ninety thousand dollars, a part of said sum, and like interest from July 1, 1884, till paid, on ninety thousand dollars, also a part of said sum; and also
54 that within the same time it pay into this court a sum of money sufficient to defray the costs of this case, to wit, the sum of twenty-five thousand dollars to be applied to the payment of the costs, charges, and expenses of the complainant herein in this behalf.

And it is further considered, adjudged, and decreed that in default of such payment within said time by the defendant herein or any holder of bonds secured by said income mortgage all equity of redemption of the said defendant, The Ohio Central Railroad Company, and of all parties to this suit, including the holders of the said income bonds, of, in, and to the said mortgaged premises, property, rights, assets, and franchises, and of every part and parcel thereof described or embraced in said main-line first mortgage and in said bill of complaint, to which reference is now had for that purpose, fully described, including all property embraced within the terms of said mortgage acquired by said The Ohio Central Railroad Company and said Ohio Central Railroad Company since the date of said mortgage, shall be barred and foreclosed, and that in default of said payments or any of them all said mortgaged premises and property, real, personal, or mixed, rights and franchises, be sold upon proper order of sale to be issued in the manner and upon the terms hereinafter directed. Said property shall be sold as an entirety, without appraisement, at public auction, at 12 m., in the room of the United States circuit court, in the Toledo Produce Exchange building, on Madison street, in the city of Toledo, county of Lucas and State of Ohio, on a day to be named by the commissioner herein appointed in his advertisement of sale, and previous notice of the time and place of said sale shall be given by publication,
55 beginning not less than sixty days prior to the time of said sale and to be repeated weekly until the sale, in two newspapers of general circulation, one published in the city of Toledo and the other in the city of New York. The said commissioner making such sale shall accept no bid from any bidder of a less sum than one million dollars, or from any bidder who shall not first place in his hands or deposit with him as a pledge that the latter will make good his bid in case of its acceptance by the court the sum of fifty thousand dollars in money or said main-line first-mortgage bonds of January 1, 1880, to the amount of two hundred thousand dollars, exclusive of interest.

And it is further ordered that of the purchase price so bid not less than the sum of twenty-five thousand dollars shall be paid in cash, and also such further portions of said purchase price shall be paid in cash as this court may in this case from time to time direct in

order to meet claims which this court may adjudge in this case to be prior in equity to such main line first mortgage, the court reserving the right to resell in this case said premises and property upon failure to comply within twenty days of any order of the court in that regard, and the balance of said purchase price not required to be paid in cash may be paid either in cash or the purchaser at said sale shall have the right to satisfy said remainder of his bid, in whole or in part, by paying over and surrendering said main-line first-mortgage bonds and overdue and unpaid coupons belonging thereto at such price or value as would be equivalent to the distributive amount that the holders thereof would be entitled to receive thereon in case the entire amount of the bid were paid in cash.

56 It is further ordered that the fund to arise from said sale shall be applied as follows:

1st. To the payment of the costs of this suit and also the compensation to complainant herein for its services, charges, and expenses, including its counsel fees, in the execution of said trust, and all proper expenses of sale.

2d. To the payment of any claims which have been or may be adjudged by the court to have priority over said main-line first mortgage.

3d. To the payment of the coupons on said main-line first-mortgage bonds of the Ohio Central Railroad Company of date of January 1, 1880, which became due and payable January 1st, 1884, and July 1st, 1884, or which may become due prior to the distribution of the proceeds of said sale, with interest accrued and to accrue to the holders of said coupons.

4th. To the payment of the principal of said main-line first mortgage bonds of January 1st, 1880.

5th. The surplus, if any, to be paid into this court, subject to its further order in this respect.

Wilbur F. Goodspeed, Esq., is hereby designated and directed as a special master commissioner to make the sale hereby decreed and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof.

And it is further adjudged and decreed that the purchaser
57 or purchasers of the property herein ordered to be sold shall be invested with and shall hold, possess, and enjoy the said mortgaged premises and property herein directed to be sold, and all the rights, privileges, and franchises appertaining thereto, as fully and completely as the said The Ohio Central Railroad Company, defendant herein, now holds and enjoys, or at the time of the commencement of this suit held and enjoyed, or is or was entitled to hold or enjoy the same; and, further, that said purchaser or purchasers shall have and be entitled to hold said railroad and property free and discharged from the lien or encumbrance of the said several and respective mortgages or deeds of trust mentioned in the bill of complaint in this suit, and from the claims of all parties to this suit, to wit, (1) the mortgage or deed of trust made by said Ohio Central Railroad Company to the complainant herein, dated January 1, 1880, to secure said main-line first-mortgage bonds of said railroad

company to the amount of three million dollars; (2) that certain mortgage or deed of trust made by said Ohio Central Railroad Company to the complainant herein, dated January 1, 1880, to secure the payment of the second-mortgage or income bonds, set forth in the bill of complaint herein, amounting to three million dollars; (3) all the claims of each and every party to this suit or of all persons whose interests are in any manner represented by any party to this suit.

And this cause is now adjourned for further consideration.

58 You are therefore hereby commanded, as such special master commissioner, to proceed to carry into execution the said decree, as you are therein and hereby directed and required, and to return the same, with a report of your doings under the same, to our said circuit court of the United States for the northern district of Ohio, western division, within sixty days from the date of this order.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 4th day of February, in the year [SEAL.] of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the 109th.

A. J. RICKS, *Clerk*,
By HALLIE W. BROWN,
Deputy Clerk.

[Endorsed:] No. 394. United States circuit court, northern district of Ohio. Central Trust Co. of New York *vs.* Ohio Central R. R. Co. Order of sale. Returnable May 5th, 1885. Returned and filed April 15th, 1885. A. J. Ricks, clerk. Swayne, Swayne & H., comp't's solicitors.

59 Afterwards, to wit, on the 15th day of April, A. D. 1885, the report of the special master commissioner on order of sale was filed in the above-entitled cause, to wit:

Report of Spec. Master Com. on Order of Sale.

Special master commissioner's report.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY. } No. 394. In Equity.

Pursuant to the command of the writ of order of sale issued from said court in the above-entitled cause on the 4th day of February, A. D. 1885, directed to me as special master commissioner, I, on the 10th day of February, A. D. 1885, caused the property of the said The Ohio Central Railroad Company, as described in the said order of sale, to be duly advertised for sale at public auction in the New York Times, a newspaper published in the city of New York, and

on the 11th day of February, A. D. 1885, a like advertisement in the Commercial Telegram, a newspaper published in the city of Toledo, in said district. Proof of publication embracing a copy of said advertisement is hereto attached and made a part of this report.

Said advertisements were published in each of said news-
60 papers at least sixty days previous to the day of sale, and said advertisements contained a pertinent description of the property to be sold and the terms of sale of said property, as directed by the court in said decree and order of sale, said sale to take place at the United States circuit court room, in the Produce Exchange building, on Madison street, in the city of Toledo, in said district, on Wednesday, the 15th day of April, A. D. 1885, at twelve o'clock noon of said day; and thereupon, on said last-named day and before said property had been offered for sale, came Charles J. Canda, Charles W. Opdyke, and Grinnell Burt, as purchasing trustees, and announced their intention of bidding at said sale, and at the same time deposited with me, as a pledge that they would make good their bid in case of its acceptance by the court, two hundred bonds of one thousand dollars each commonly called main-line bonds, secured by the deed of trust or mortgage to the said The Central Trust Company of New York, dated January 1, A. D. 1880, as provided in said decree; and thereupon, on the day and at the time and place mentioned in said advertisements, I proceeded to offer the said property for sale at public auction, and at the same time announced the terms and conditions of sale, as provided in said decree and order of sale; and thereupon, and before any bid had been received for said property, came J. Augustus Johnson, in behalf of the holders of bonds of the terminal property

of said The Ohio Central Railroad Company, and requested
61 me to state whether or not the sale of the said terminal property in cause No. 396 in said court (which sale was advertised to take place at the same time as the sale of the property described in this cause) would immediately follow the sale in this case. I thereupon announced that the sale of said terminal property would follow as soon as the property to be sold in this cause was sold and struck off.

Whereupon came the said Charles J. Canda, Charles W. Opdyke, and Grinnell Burt, as purchasing trustees, and bid for said railroad and property, as described in said order of sale, the sum of one million dollars ($1,000,000.00) therefor, and after diligent effort to obtain a higher and better bid for said property I thereupon publicly sold and struck off the same to the said Charles J. Canda, Charles W. Opdyke, and Grinnell Burt, as purchasing trustees, for said sum of one million dollars ($1,000,000.00), and said sum being the least amount for which said property was by the terms of said decree ordered to be sold.

The said two hundred bonds of one thousand dollars each, amounting in the aggregate, exclusive of interest, to the sum of two hundred thousand dollars, I now hold in my custody.

WILBUR F. GOODSPEED,
Special Master Commissioner.

62 *Proof of Publication.*

Special master commissioner's sale.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY. } No. 394. In Equity.

Pursuant to the command of an order of sale issued from said court in the above-entitled cause, directed to me as special master commissioner, I shall offer for sale at public auction, in the United States circuit court room, in the Toledo Produce Exchange building, on Madison street, in the city of Toledo, county of Lucas and State of Ohio, in said district, on Wednesday, the fifteenth day of April, A. D. 1885 (or on any day to which said sale may be adjourned), at twelve o'clock noon, the following-described property, to wit:

All and singular the line of railroad of said Ohio Central Railroad Company as the same is constructed from Toledo, in the county of Lucas, in the State of Ohio, through the counties of Lucas, Wood, Seneca, Wyandot, Crawford, Marion, Morrow, Delaware, Knox, Licking, Fairfield, and Perry to the village of Corning, in said county of Perry, and from Bush's station, Fairfield county, and Columbus, Franklin county, in the counties of Fairfield and Franklin, all in the State of Ohio, being about two hundred miles in length, together with all and singular the rights of way, road-bed, its track laid between the terminal points aforesaid, and all the stations, depot grounds, rails, fences, bridges, sidings, engine-houses, machine shops, buildings, erections in any way appertaining unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures held, owned, or acquired by the said Ohio
63 Central Railroad Company for use in connection with its line of railroad aforesaid, and all its depot grounds, yards, sidings, turn-outs, sheds, machine shops, leasehold rights, and other terminal facilities owned by said Ohio Central Railroad Company, together with all and singular the powers and franchises thereto belonging and the tolls, income, and revenue levied and derived therefrom, including all property embraced within the certain first mortgage executed to the said The Central Trust Company of New York, dated on the first day of January, 1880, owned by the said The Ohio Central Railroad Company at the time of the date of said mortgage or thereafter acquired by said railroad company, and being the same property mentioned and described in the decree in this suit dated December 2nd, 1884.

The said property will be sold as an entirety, without appraisement, and for not less than the sum of one million dollars, and no bid will be accepted from any bidder who shall not first place in my hands or deposit with me as a pledge that such bidder will make

good his bid in case of its acceptance by the court the sum of fifty thousand dollars in money or the bonds secured by the mortgage to said The Central Trust Company of New York as aforesaid to the amount of two hundred thousand dollars, exclusive of interest; that out of the purchase price so bid not less than the sum of twenty-five thousand dollars shall be paid in cash, and also such further portions of said purchase price shall be paid in cash as said court may
64 in this case from time to time direct, in order to meet claims which said court may adjudge in this case to be prior in equity to said first mortgage, the court reserving the right to resell in this case said premises and property upon failure to comply within twenty days of any order of the court in that regard, and the balance of said purchase price not required to be paid in cash may be paid either in cash or the purchaser at said sale shall have the right to satisfy said remainder of his bid, in whole or in part, by paying over and surrendering said first-mortgage bonds and overdue and unpaid coupons belonging thereto, at such price or value as would be equivalent to the distributive amount that the holders thereof would be entitled to receive in case the entire amount of the bid were paid in cash.

WILBUR F. GOODSPEED,
Special Master Commissioner.

BUTLER, STILLMAN & HUBBARD,
SWAYNE, SWAYNE & HAYES,
Complainant's Solicitors.

Toledo, Ohio, February 6th, 1885.

65 STATE OF OHIO, }
Lucas County, } *ss*:

A. W. Francisco, being first duly sworn, makes oath and says he is a member of the firm of Comly & Francisco, the publishers of the Commercial Telegram; that he personally knows the facts herein stated; that said Commercial Telegram is a newspaper printed and of general circulation in said county; that there is published both a daily and weekly edition of said newspaper, and the circulation of — daily in said county of Lucas exceeds that of said weekly, and that the notice of which the annexed is a true copy was published in said Daily Commercial Telegram upon Wednesday of each week for nine consecutive weeks, beginning on the 11th day of February, A. D. 1885.

A. W. FRANCISCO.

Sworn to and subscribed before me this 15th day of April, A. D. 1885.

A. J. SNELL,
Notary Public, Lucas County, Ohio.

66 Afterwards, to wit, on the 15th day of June, A. D. 1885, the following decree and reference was duly entered on the journal of said court, to wit:

Decree & Reference to Find Am't of Distributive Share on Bonds.

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY. } No. 394.

In this cause it appearing to the court that a large number of the bonds and coupons secured by the mortgage foreclosed in this proceeding are outstanding and not in the possession of the purchasers of the mortgaged property, it is ordered that A. J. Ricks, Esq., be appointed a special master, because of his experience in matters of accounting, to ascertain and report what will be the distributive share due on the principal of each bond secured by said mortgage and what sum will be due on each class of coupons maturing Jan'y 1st and July 1st, 1884, Jan'y 1st, 1885, and interest thereon, and coupons to mature July 1st, 1885, and, further, what sum should be paid into court by such purchasers to redeem and pay the distributive share of whatever of bonds he may find outstanding and the coupons and interest on same, as above described, and that he make his report as soon as possible; and to enable said master to make his calculations and report upon the basis prescribed, it is now ordered that the following allowances as expenses connected with the proceeding be made, viz:

To complainant and its counsel, the sum of $8,000 and their reasonable expenses, to be reviewed by the master; to J. E. Martin, as receiver, $600 per month; to receiver's counsel, A. W. Scott, $5,000, and to C. H. Scribner, $1,000; to Special Master W. F. Goodspeed, $3,500, and court costs to be estimated as near as practicable.

67 Afterwards, to wit, on the 22nd day of June, A. D. 1885, the following report of special master as to distributive share of bonds, &c., was duly filed in the above-entitled cause, to wit:

Report of Spec. Master as to Distributive Share of Bonds, &c.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY. } Equity, No. 394.

To the honorable the judges of the circuit court:

The undersigned was appointed a special master at the June term, 1885, of said court to ascertain and report the distributive share that will be due on the principal of each bond issued under and secured by the mortgage herein foreclosed after paying the interest coupons due thereon and to become due July 1st, 1885, and also the sum due on each past-due coupon, together with interest thereon to June 30th, 1885. I was also to ascertain and report how many of said bonds are in the hands of the purchasing committee and how many coupons are attached thereto; how many of said bonds are outstanding and what sum should be paid into court to

redeem such bonds and coupons past due and to become due June 30th, 1885, and to meet the expenses of said sale.

In pursuance to said order and at the request of all parties and for their convenience and interest I went to the city of New York, where said bonds were deposited for safe keeping, and I there ascertained from an examination of the officers of said Central Trust Company, the trustee named in said mortgage, and by its
68 certificate which I hold, that it has in its custody and safe keeping and subject to the orders of the purchasing committee, Charles W. Opdyke and his associates, who are the purchasers of the Ohio Central railroad, named in the report of Commissioner W. F. Goodspeed, two million six hundred and ninety-two thousand dollars, being 2,692 of said bonds of $1,000 each. Two hundred thousand dollars (200 bonds) of said bonds are now deposited with said Goodspeed, as per terms of said sale, on behalf of said committee. All coupons which mature on and after January 1st, 1884, are attached to said bonds. This would leave one hundred and eight thousand dollars (108 bonds) outstanding of said bonds. What coupons are attached thereto I cannot report.

I have prepared and submit herewith a computation which answers the several points which I was ordered to report, viz:

Amount which said purchasers should pay to Master Commissioner Goodspeed is, first, to meet expenses of suit and sale	$31,850 00
Second, to provide for redeeming 108 bonds and coupons	34,853 40
Total	$66,703 40

The following calculation exhibits the matter in detail, viz:

69 Gross amount of sale of railroad			$1,000,000
Out of which are to be paid the sums following, viz:			
Court allowances:			
Complainant, its counsel, &c.	$8,000		
Expenses of same	500		
Receiver J. E. Martin, salary 21 mos. @ 600	12,600		
" Counsel A. W. Scott, 5,000; C. U. Scribner, 1,000	6,000		
Special Master W. F. Goodspeed	3,500		
Court costs, estimated	1,250		
Total expenses of sale to be paid		31,850	
Coupons to be paid from proceeds of sale:			
3,000 coupons due Jan. 1st, 1884	$90,000		
int. to July 1st, 1885	8,100		
	98,100		
" " due July 1st, 1884	90,000		
int. to July 1st, 1885	5,400		
	95,400		
" " due July 1st, 1885	90,000		
int. to July 1st, 1885	2,700		
	92,700		
" " due July 1st, 1885	90,000		
		376,200	
			408,050
Nett proceeds to be distributed among 3,000 bonds			591,950

Distributive share due on principal of each bond, $197.31⅔ (3,000 × 197.31⅔ = $591,950).

Sum due on past-due coupons and int. on same and on coupons due July 1st, 1885, on each bond, $125.40 (3,000 × 125.40 = $376,200).

Amount which should be paid into court on 108 outstanding bonds is as follows:

On principal of 108 bonds @ 197.31⅔ each equals	$21,310 20
On interest coupons 108 bonds @ 125.40 each equals	13,543 20
Total sum to be paid into court on bonds	$34,853 40

Recapitulation.

Distributive share due on each bond, prin. & int.	$322 71⅔
Coupons & int. due Jan'y 1st, 1884	32 70
Coupons & int. due July 1st, 1884	31 80
Coupons & int. due Jan'y 1st, 1885	30 90

70 To save expense in sending above bonds to this place I went to New York, as above stated. My expenses there and while there and travel amount to $60, which I ask to be reimbursed, and for services rendered herein I ask an allowance of $—.

All of which is respectfully submitted.

A. J. RICKS,
Special Master.

71 Afterwards, to wit, on the 25th day of June, A. D. 1885, the same being a day of the June term of said court, the following order was duly entered on the journal, to wit:

Confirmation of Sale.

THE CENTRAL TRUST COMPANY OF NEW YORK
against
THE OHIO CENTRAL RAILROAD COMPANY. } In Equity. No. 394.

And now, on this day, this cause came on further to be heard upon the application of the complainan therein, The Central Trust Company of New York, to confirm the sale made herein on the 15th day of April, 1885, by Wilbur F. Goodspeed, Esquire, appointed for the purpose by the former order of this court, to Charles J. Canda, Charles W. Opdyke, and Grinnell Burt, as purchasing trustees, and upon producing the report of said special master commissioner of said sale, and sufficient notice of the hearing of said application having been given to the solicitors for the parties to this cause, and the court having fully examined the report of said special master commissioner of said sale and his doings in pursuance of the decree of sale herein, and finding the same correct and in all respects in conformity to law and with the orders of this court, and that the amount bid at said sale as reported by said special master commissioner in said report of sale, to wit, the sum of one million dollars,
72 was the highest and best bid for the premises and property, rights and franchises, so ordered to be sold by him at said time—

It is not [now] therefore ordered, adjudged, and decreed that the said

sale be, and the same is hereby, ratified and confirmed, and all proceedings of the said special master commissioner in that regard are hereby approved and confirmed.

And it having been referred to A. J. Ricks, Esq., as special master, to ascertain and report to the court the amount of the distributive share of the bonds and coupons secured by the main-line first mortgage of the Ohio Central Railroad Company, and the amount which said purchasers should be required to pay in cash on account of the said purchase price in order to make the several cash payments hereinafter directed to be made and to pay the amount of the distributive share of the said bonds and coupons not presented by said purchasers for stamping, as hereinafter provided, and said special master having made and filed his report, it is further ordered, adjudged, and decreed that said last-mentioned report be, and is hereby, in all respects confirmed.

And it is further ordered, adjudged, and decreed that the purchasers at said sale pay to Wilbur F. Goodspeed, Esq., the said special master commmissioner, the sum of thirty-one thousand
73 eight hundred and fifty dollars ($31,850.00) in cash, for the purpose of making the payments to the clerk and to the receiver and his counsel and to the complainant and its attorneys and for his own compensation and expenses hereinafter directed to be made, and that they pay into court to A. J. Ricks, as special master, the further sum of thirty-four thousand eight hundred fifty-three and forty one-hundredths dollars ($34,853.40) in cash, being the entire distributive share of said purchase-money to which the holders of the bonds and coupons not presented by said purchasers are entitled, as ascertained and determined by the report of said A. J. Ricks, special master, and that said sum be distributed by said special master through the registry of the court to the holders or persons presenting said bonds and coupons described herein, and that he pay on each such bonds and coupons the distributive share as herein fixed, less the sum of $3.50, the prescribed fee for receiving and distributing said fund, and endorsing the sum paid on said bonds, and he shall at the same time endorse on each such the sum so paid, and the holder thereof shall thereafter hold said bond solely for the portion thereof remaining unpaid thereon, and that the balance of said purchase price may be paid either in cash or in the main-line first-mortgage bonds of the Ohio Central Railroad Company and due and unpaid coupons belonging thereto at the price or value which will be equivalent to the distributive amount (as ascertained by said last-mentioned report) which the holders thereof would be entitled to receive
74 thereon in case the entire amount of the bid were paid in cash—that is to say:

Each coupon due January 1, 1884, at $32.70.
Each coupon due July 1, 1884, at $31.80.
Each coupon due January 1, 1885, at $30.90.
Each coupon due July 1, 1885, $30.00.
Each bond, $197.31⅓.

That upon the making of the several payments aforesaid the said

Wilbur F. Goodspeed, Esquire, the special master commissioner herein, shall, by proper instrument in writing, convey in fee simple to Charles J. Canda, Charles W. Opdyke, and Grinnell Burt as purchasing trustees, the purchasers at said sale, or to their assigns, all and singular the property, premises, rights, and franchises described in the decree of sale heretofore entered in this cause by this court by the description contained in the said decree, and all the right, title, and interest, at law or in equity, of all the parties to this suit in and to the same or any part thereof; and the said Ohio Railroad Company and the several parties to this action are hereby forever barred and foreclosed of all equity of redemption of said property and premises.

And it is further ordered, adjudged, and decreed that any cash or bonds heretofore deposited with said special master commissioner as a pledge by the purchasers that they would make good their
75 bid in case the same should be accepted by the court in this cause be considered, if the purchasers so elect, to be received by the said special master commissioner as part payment under and according to the terms of this order.

And it is further ordered, adjudged, and decreed that the said special master commissioner, upon receiving any of the said bonds in this decree described or any of the coupons belonging thereto on account of payment of the purchase price of the said property so sold, shall, to the extent that any of the said bonds or coupons are taken at their full face value with interest, cancel the same; but if any of the said bonds or coupons are taken for any fractional part of their full face value, then the said commissioner shall stamp upon the same the amount or percentage at which they are so taken, and shall return the same to the persons presenting the same, who shall thereafter hold them solely for the portion thereof which shall not have been so paid through the said sale and purchase.

And it is further ordered, adjudged, and decreed that upon the execution and delivery of said deed all the parties to this cause and the receiver appointed herein shall, and they are hereby required and directed to, surrender and deliver possession of all and singular the property, premises, rights, and franchises aforesaid, so sold as aforesaid, to the said purchasers or their assigns upon presentation of the said deed and demand made for such possession;
76 and, further, that said receiver shall thereafter with all convenient speed file his final report of his doings as receiver in this cause, and that all questions as to the distribution of any funds, claims, or property in the receiver's hands be reserved until the coming in of his report.

And it is further ordered, adjudged, and decreed that, upon payment to the said special master commissioner of the said purchase price according to the terms of this order, the said special master commissioner proceed to distribute the same in the following manner—that is to say:

1. That he first pay the costs of this suit, including the costs of the clerk of this court, taxed, as estimated, at twelve hundred and fifty dollars.

2. That he next take from such purchase price as compensation for his services as special master commissioner the sum of three thousand five hundred dollars.

3. That he next pay to Butler, Stillman & Hubbard and Swayne, Swayne & Hayes, solicitors for the complainant herein, the sum of eight thousand dollars as a gross sum for their compensation for their services and for the services of the complainant herein, and also the further sum of five hundred ($500) dollars for their expenses and disbursements herein.

4. That he next pay to John E. Martin, receiver herein, the sum of twelve thousand six hundred dollars as compensation for
77 his services as receiver in this cause, being at the rate of $600 per month from October 1, 1884, to July 1, 1885.

5. That he next pay A. W. Scott, counsel for the receiver herein, the sum of five thousand dollars as a gross sum for his compensation as such counsel, and also the sum of one thousand dollars to Charles H. Scribner, Esq., counsel for said receiver.

6. That he next pay the past-due coupons upon said main-line first-mortgage bonds which became due on January 1st, 1884; July 1st, 1884; January 1st, 1885, and July 1st, 1885, with interest accrued upon said coupons to the date of the payment into court of their distributive share, as hereinbefore directed.

7. That he next apply the balance of said purchase price to the payment of the principal of said main-line first-mortgage bonds of January 1st, 1880.

And it appearing to the court that there are outstanding certain coupons appertaining to said main-line first-mortgage bonds which became due and payable prior to January 1, 1884, but which have not been paid, it is further ordered that the special master to be hereafter appointed to pass upon the accounts of the receiver advertise, in such manner as the court shall, in the order appointing him, direct, for the presentation to him and proof before him of such coupons, and that the face value thereof when so presented and proved shall be paid to the owners and holders thereof out of the funds in the receiver's hands.

78 And all further questions in respect to the accounts of said receiver and to judgment for any deficiency herein and all other questions arising in this cause are reserved until the coming in of the report of said special master commissioner of his acts and doings under this order and the filing of said receiver's account.

79 Afterwards, to wit, on the 11th day of July, A. D. 1885, the report of special master commissioner was filed in the above-entitled cause, to wit:

Report of W. F. Goodspeed, Spec. Master Commissioner.

Special master commissioner's report.

United States Circuit Court, Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY. } No. 394.

Pursuant to the order entered in this cause at the June term, 1885, of said court, to wit, on the 25th day of June, 1885, the undersigned herewith submits his report of his doings thereunder.

That after the confirmation of the sale of said Ohio Central railroad I made, executed, and delivered to the said Charles J. Canda, Charles W. Opdyke, and Grinnell Burt, as purchasing trustees, who were the purchasers at said sale, a deed in due form of said Ohio Central railroad, embracing in said deed the property described in the order of sale heretofore issued to me in this cause.

And afterwards, at the request of the parties interested, I proceeded to New York for the purpose of canceling the overdue coupons attached to the bonds presented by said purchasing
80 trustees in part payment for said property and for the purpose of stamping upon the face of each bond the *pro rata* share that each of said bonds would be entitled to receive after payment of the overdue coupons falling due January 1, 1884, July 1, 1884, January 1, 1885, and July 1, 1885, and the interest thereon.

That said purchasers turned over to me 2,692 bonds of $1,000.00 each of said railroad company in part payment for said property, which, together with the 200 bonds heretofore deposited with me at the time of said sale, makes a total of 2,892 bonds, of $1,000.00 each.

I thereupon cancelled the coupons attached to all of said bonds, as commanded in said order, to wit:

2,892 coupons, due January 1, 1884.
2,892 coupons, due July 1, 1884.
2,892 coupons, due January 1, 1885.
2,892 coupons, due July 1, 1885.

I also stamped upon the face of each of said 2,892 bonds the following endorsement, to wit:

"Central Trust Company *vs.* Ohio Central Railroad Company. $197.31⅓ paid on within bond.

W. F. GOODSPEED,
Special Master Com'ss'r."

And, by direction of said purchasers, I turned over all of said 2,892 bonds to the said Central Trust Company.

I have also received from said purchasers, to meet the expenses

of suit and sale, the sum of $31,850.00, and which sum I have distributed as commanded in said order, to wit:

81	Swayne, Swayne & Hayes, counsel	$8,000 00
	Same for expenses of counsel	500 00
	J. E. Martin, receiver	12,600 00
	A. W. Scott, counsel	5,000 00
	A. H. Scribner, counsel	1,000 00
	A. J. Ricks, clerk	1,250 00
	And have retained my allowance as special master commissioner	3,500 00
		$31,850 00

I also received from said purchasers the sum of $34,853.40, the amount necessary to provide for redeeming 108 bonds and coupons thereto belonging, now presented by said purchasers in part payment for said property, and which said sum of $34,853.40 I have paid to A. J. Ricks, special master.

WILBUR F. GOODSPEED,
Special Master Commissioner.

82 Afterwards, to wit, on the 22nd day of June, A. D. 1887, the following judgment was duly entered on the journal of said court, to wit:

Judgment for Deficiency.

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY. } No. 394.

This day this cause came on for further hearing, and it appearing to the court that from the proceeds of the sale of the property of said defendant company in this cause heretofore made there had been paid upon each of the three thousand bonds secured by the first main-line mortgage in the bill of complaint set forth the interest coupons thereon up to and including June 30th, 1885, and the sum of one hundred and ninety-seven and thirty-one and two-thirds one-hundredths dollars ($197.31⅔) to be applied upon the payment of the principal of each of said bonds, said payment to bear date of June 30th, 1885, and no other payments of either principal or interest have been made upon any of said bonds than as aforesaid, the court therefore find that there is due from said defendant, The Ohio Central Railroad Company, to the complainant, as trustee for the holders of said bonds secured by said first main-line mortgage, upon each of said bonds, the sum of eight hundred and two and 68 and one-third one-hundredths dollars ($802.68⅓), which sum should bear interest at the rate of six per cent. per annum until paid.

And the court further finds that no fund has come under the control of this court from which any payment can be made upon the

three thousand main-line income bonds in the bill of complaint set forth, and that no payments of any kind have been made
83 upon any of said income bonds. Wherefore the court find that there is due from the defendant, The Ohio Central Railroad Company, to the complainant, as trustee of the holders of said income bonds, upon each of said bonds, the sum of one thousand ($1,000) dollars.

Wherefore it is ordered, adjudged, and decreed that the complainant, The Central Trust Company of New York, as trustee for the holders of said three thousand bonds secured by said first main-line mortgage, have and recover from the defendant, The Ohio Central Railroad Company, the sum of eight hundred and two and sixty-eight and one-third one-hundredths dollars ($802.68⅓) on each of said bonds, to wit, the sum of $2,408,050, with six per cent. interest per annum from July 1st, 1885, and that the said complainant, as trustee for the holders of said three thousand main-line income bonds, have and recover from said defendant, The Ohio Central Railroad Company, the sum of one thousand dollars ($1,000) on each of said bonds, to wit, the sum of three million dollars, and that execution issue therefor.

Afterwards, to wit, on the 17th day of June, A. D. 1889, the following order allowing appeal was duly entered on the journal of said court, to wit:

84 *Allowance of Appeal.*

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY.

This cause came on to be heard on the motion of the Ohio Central Railroad Company for an appeal from the final decree in this cause to the next term of the Supreme Court, and the court, being fully advised in the premises, does grant said motion, said appeal bond being fixed at one thousand dollars.

85 Afterwards, to wit, on the 17th day of June, A. D. 1889, the following appeal was filed in the above-entitled cause, to wit:

Appeal.

Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK
against
THE OHIO CENTRAL RAILROAD COMPANY.

To the honorable the Supreme Court of the United States:

The appeal of the Ohio Central Railroad Company respectfully showeth—

That heretofore and on the 7th day of January, 1884, the above-

named complainant filed its bill in the circuit court of the United States for the northern district of Ohio, western division, against the above-named respondent, The Ohio Central Railroad Company; and thereupon said The Ohio Central Railroad Company, by its solicitor, entered its appearance and waived the issue and service of subpœna upon it.

That thereafter and on the second day of June, 1884, it appearing to the court that said defendant had failed to plead, answer, or demur to the bill aforesaid, on motion of the complainant's solic-
86 itors, it was therein ordered that said bill of complaint be taken as confessed by said defendant, and that a decree *pro confesso* be entered against said defendant and in favor of said complainant, according to the prayer of said bill.

That thereafter and on the 10th day of December, 1884, a decree for order of sale was made in said cause, to which for the contents thereof the appellant refers.

That thereafter and on the 25th day of June, 1885, an order was entered confirming the sale made under the decree aforesaid.

That thereafter and on the 22nd day of June, 1887, an order was made in said cause wherein it was in substance ordered, adjudged, and decreed as follows:

"That the complainant, The Central Trust Company of New York, as trustee for the holders of said three thousand bonds secured by said first main-line mortgage (referring to the first mortgage mentioned in said bill), have and recover from the defendant, The Ohio Central Railroad Company, the sum of eight hundred and two and sixty-eight and one-third one-hundredths dollars ($802.68⅓) on each of said bonds, to wit, the sum of two million four hundred and eight thousand and fifty dollars ($2,408,050), with six per cent. interest thereon from July 1st, 1885, and that the complainant, as trustee for the holders of said three thousand main-line income bonds (being the income bonds mentioned in the said bill), have
87 and recover from said defendant, The Ohio Central Railroad Company, the sum of one thousand dollars on each of said bonds, to wit, the sum of three million dollars, and that execution issue therefor."

That said order and every part thereof is, as this appellant is advised, wholly erroneous.

Wherefore this appellant appeals from the whole of said order of said circuit court of the United States made and entered as aforesaid on the 22nd day of June, 1887, and from each and every part thereof, and respectfully prays that the said order of the said circuit court and the bill, order *pro confesso*, decree of sale, decree of confirmation of sale, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said order or decree of the circuit court and every part thereof may be reversed, and such other and further decree or order made in the premises as to the Supreme Court may seem just and proper.

THE OHIO CENTRAL RAILROAD COMPANY,
By H. L. TERRILL, *Its Solicitor.*

The foregoing appeal is hereby allowed, and the appeal bond for costs is fixed at the sum of one thousand dollars.

Dated June 17, 1889.

HOWELL E. JACKSON,
Circuit Judge.

88 *Waiver of Citation. Entry of Appearance.*

We hereby waive the issue and service of citation in the above-entitled appeal, and hereby enter our appearance herein.

BUTLER, STILLMAN & HUBBARD,
Solicitors for the Central Trust Co.

Afterwards, to wit, on the 20th day of June, A. D. 1889, the following order approving bond for appeal was duly entered on the journal of said court, to wit:

89 *Approval of Bond.*

THE CENTRAL TRUST COMPANY OF NEW YORK
vs.
THE OHIO CENTRAL RAILROAD COMPANY.

This 20th day of June, A. D. 1889, came the defendant, The Ohio Central Railroad Company, and tenders its bond in the sum of one thousand dollars, with Dan. P. Eells as surety, for the appeal of this cause to the Supreme Court of the United States, and prays that said bond and the surety thereof may be approved, which is accordingly done.

90 Know all men by these presents that we, The Ohio Central Railroad Company, as principal, and Dan. P. Eells, as surety, are held and firmly bound unto The Central Trust Company in the sum of one thousand dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-bounden The Ohio Central Railroad Company has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, western division, bearing date the 22d day of June, A. D. 1887, in a cause wherein the said The Central Trust Company was complainant and the said The Ohio Central Railroad Company was respondent: Now, therefore, the condition of this obligation is such that if the above-named appellant, The Ohio Central Railroad Company, shall prosecute said appeal with effect and pay all such damages, costs, and expenses as shall be awarded against it as such

appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

THE OHIO CENTRAL RAILROAD COMPANY,
SAMUEL THOMAS, *President.* [SEAL.]
DAN. P. EELLS. [SEAL.]

Sealed and delivered in presence of, as to O. C. R. R. Co.:
J. W. SIMPSON,
L. M. SCHWAN.

Approved:
E. S. HAMMOND, *Judge.*

91 [Endorsed:] No. 394. In the circuit court of the United States for the northern district of Ohio. Central Trust Company of New York *vs.* Ohio Central R. R. Co. Appeal bond. Approved and filed —— —, 187–. —— ——, clerk. Filed June 20, 1889. A. J. Ricks, clerk.

92 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Martin W. Sanders, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the bill and exhibit, decree *pro confesso*, decree for order of sale, order of sale, report of special master commissioner on order of sale, decree and reference to find amount of distributive share on bonds, report of special master as to distributive share of bonds, &c., confirmation of sale, report of W. F. Goodspeed, judgment for deficiency, allowance of appeal, appeal, waiver of citation, and entry of appearance, approval of bond, appeal bond in the above case, as fully hereinbefore entitled, as the same appears from the files and record of said court now remaining in my custody.

Seal of the Circuit Court, North'n Dist. of Ohio.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Toledo, in said district, on this eighteenth day of September, A. D. 1889, and of the 114th year of the Independence of the United States of America.

MARTIN W. SANDERS, *Clerk,*
By HALLIE W. BROWN,
Deputy Clerk.

Endorsed on cover: N. Ohio C. C. U. S. No. 1288. The Ohio Central Railroad Company, appellant, *vs.* The Central Trust Company of New York. Filed October 4, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1288.

THE OHIO CENTRAL RAILROAD COMPANY,
Appellant,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK.

BRIEF FOR APPELLANT.

ASHBEL GREEN,
H. L. TERRELL,
THOMAS THACHER,
Counsel.

C. G. Burgoyne's Printing Business, Cor. Walker and Centre Sts., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1889. No. 1288.

THE OHIO CENTRAL RAILROAD COMPANY,
Appellant,

AGAINST

THE CENTRAL TRUST COMPANY OF NEW YORK.

BRIEF FOR APPELLANT.

This is an appeal from the Circuit Court of the United States for the Northern District of Ohio, and concerns a so-called *judgment for deficiency* entered therein against the appellant on June 22d, 1887.

The suit was begun on January 7th, 1884, by the filing of the bill of the Central Trust Company (Record, pp. 1–6).

The said bill alleges:

(1) The existence and status on January 1st, 1880, of the original Ohio Central Railroad Co.

(2) The execution on January 1st, 1880, and the issue and delivery thereafter by the original Ohio Central Railroad Co. of 3,000 bonds for $1,000 each, dated January 1, 1880, payable to bearer on January 1, 1920, with six per cent. interest, payable

semi-annually on the first days of January and July; and the fact that these bonds were outstanding in the hands of divers persons. (The exact form of the bonds is shown in the copy of mortgage "Exhibit A," Record, p. 7).

(3) The execution, delivery and recording of a deed of trust or mortgage to the Central Trust Company as trustee, for the security of said bonds, covering the main line of the Ohio Central Railroad. Exhibit "A" is a copy (Record, pp. 6–13).

(4) The subsequent consolidation of the original Ohio Central Railroad Co. and another company, by which the Ohio Central Railroad Co., defendant, was formed.

(5) Default in payment of interest January 1, 1884, presentation of coupons, demand of payment and refusal.

(6) The execution and delivery, after and subject to the aforesaid mortgage (known as the Main Line First Mortgage) of another mortgage to the same trustee, on the same property (known as the Main Line *Income* Mortgage) to secure 3,000 income bonds for $1,000 each, payable to bearer; the recording of said mortgage; the authentication of the bonds; the fact that the holders are numerous and unknown; that the lien of said mortgage is subject to that of the mortgage previously mentioned.

(7) Insufficiency of the mortgaged property; floating indebtedness of the company; proceedings of creditors; appointment of Receiver in River Division suit.

(8) That there have been no other proceedings for the purposes of the bill.

And the bill prays :

(*a*) That the defendant make answer.

(*b*) That an account be had of the bonds secured by said mortgages "and of the amount due on said *first mortgage bonds* for principal and interest, or either," and that the names of the lawful holders thereof be ascertained.

(*c*) That an account be taken of all liens, and that said *first mortgage* be decreed a first lien.

(*d*) That the property be sold free from the claims of all parties and of all in any manner represented ; that defendant and others claiming under it be barred and foreclosed; that provision be made for ascertainment of the priorities of said incumbrances and for the due application of the proceeds of such sale according to the rights of the parties.

(*e*) That a Receiver be appointed, and an injunction issued, *pendente lite*.

(*f*) That such other or further relief be given as the nature of the case may require and to the Court may seem meet.

The foregoing abstract of the bill is intended to be complete and is important as showing what the allegations of the bill *do not cover*, and what the prayer of the bill *does not seek* ; it being the contention of the appellant that the judgment for deficiency was wholly beyond the scope of the bill and the purpose of the suit.

The bill seeks foreclosure of the first mortgage only. It alleges no default under the income mortgage. Under the first mortgage the only default is in respect to interest. It shows no principal due, or in any contingency to become due before 1920. It prays for no judgment for deficiency, for no money judgment, for no final relief except the foreclosure of the lien of the first mortgage upon the property by sale.

From Exhibit A it appears that the principal of the first mortgage bonds was in no event to become due until 1920. As to the income bonds, the mortgage not being set out, it does not appear when they were to become due. The very general averment as to the income mortgage—sufficient in a bill not seeking any relief thereon—is followed by a prayer for leave to produce and refer to said mortgage upon the hearing of the cause. It appears from the record that it was not produced; there was no occasion for its production. If it were in the record it would appear that in no contingency could any of the principal of the income bonds become due until 1920.

Upon the filing of the bill the defendant, The Ohio Central Railroad Company, entered its appearance and waived the issue and service of subpœna upon it (Record, p. 6).

On the second day of June, 1884, said The Ohio Central Railroad Company having failed to plead, answer or demur to the bill aforesaid, and this fact appearing to said Court, it was on motion of the solicitors for said The Central Trust Company of New York in said cause ordered, that said bill be taken as confessed by said The Ohio Central Railroad Company, and that a decree *pro confesso* be entered against said The Ohio Central Railroad Company and in favor of said The Central Trust Company *according to the prayer of said bill* (see Record, p. 17).

On the 10th day of December, 1884, a decree for

order of sale was duly entered in said cause (see Record, pp. 17–23).

The findings of fact stated in this decree are substantially the same as the allegations of the bill, with a further finding as to continued default after the commencement of the suit. Nothing is *found due* except two installments of interest on the First Mortgage bonds—no principal of any bonds is found due, and nothing whatever, whether principal or interest, is found due on the income bonds. The decree directs payment in thirty days of the amount of the two installments of interest on the first mortgage bonds, with interest, and the costs, and in default of such payment, sale of the mortgaged property, and application of proceeds to (1) costs of suit and expenses of sale, trustees' compensation and expenses; (2) claims prior to first mortgage; (3) coupons due and before distribution to become due on the first mortgage bonds; (4) principal of first mortgage bonds; and (5) the surplus, if any, to be paid into said Court, subject to its further order.

There is no decree as to payment of principal or interest on the *income bonds*.

Under an order of sale issued on February 4, 1885, in accordance with said decree (Record, p. 23), the mortgaged property was on April 15, 1885, sold to Canda, Opdyke and Burt, as purchasing trustees, for $1,000,000 (Record, pp. 29, 30), said sale was confirmed June 25, 1885 (Record, pp. 35–38), and the mortgaged property was conveyed accordingly to the said purchasers (Record, p. 39).

Prior to the confirmation of sale, but after the sale had been reported, a reference was had to ascertain *the distributive share of the proceeds of sale* due on the principal of each bond secured by the first mortgage, and what sum the purchasers should pay into Court, to pay the distributive share of whatever bonds might be found outstanding; and, thereupon, it was found that interest being first paid,

there would be $197.31⅔ to apply on principal of each first mortgage bond; and the proceeds of sale were applied after payment of prior charges to pay all interest to July 1, 1885, and $197.31⅔ on the principal of each of the first mortgage bonds (Record, pp. 33–35, 39, 40).

The foregoing statement shows all the proceedings in the cause, prior to the entry of the so-called *judgment for deficiency* of which appellant complains.

That judgment, entered June 22d, 1887, is in the words following:

"This day this cause came on for further hear-
"ing, and it appearing to the Court that from the
"proceeds of the sale of the property of said de-
"fendant company, in this cause heretofore made,
"there had been paid upon each of the three
"thousand bonds secured by the first main line
"mortgage, in the bill of complaint set forth, the in-
"terest coupons thereon up to and including June
"30th, 1885, and the sum of one hundred and
"ninety-seven and thirty-one and two-thirds one
"hundredth dollars ($197.31⅔), to be applied
"upon the payment of the principal of each of
"said bonds, said payment to bear date of
"June 30th, 1885, and no other payments of either
"principal or interest have been made upon any of
"said bonds than as aforesaid; the Court therefore
"find that there is due from said defendant, The Ohio
"Central Railroad Company, to the complainant as
"trustee for the holders of said bonds secured by said
"first main line mortgage, upon each of said bonds the
"sum of eight hundred and two and sixty-eight and
"one-third one-hundredth dollars ($802.68⅓), which
"sum should bear interest at the rate of six per cent.
"per annum until paid.

"And the Court further finds that no fund has come
"under the control of this Court from which any pay-
"ment can be made upon the three thousand main line

" income bonds, in the bill of complaint set forth, and " that no payments of any kind have been made upon any " of said income bonds; wherefore the Court find that " there is due from the defendant, The Ohio Central " Railroad Company, to the complainant as trustee of " the holders of said income bonds, upon each of said " bonds the sum of one thousand ($1,000) dollars.

" Wherefore, it is ordered, adjudged and decreed that " the complainant, The Central Trust Company of New " York, as trustee for the holders of said three thousand " bonds, secured by said first main line mortgage, have " and recover from the defendant, The Ohio Central " Railroad Company, the sum of eight hundred and two " and sixty-eight and one-third one-hundredth dollars " ($802.68⅓) on each of said bonds, to wit, the sum of " $2,408,050, with six per cent interest per annum from " July 1st, 1885; and that the said complainant as trus- " tee for the holders of said three thousand main line " income bonds have and recover from said defendant, " The Ohio Central Railroad Company, the sum of one " thousand dollars ($1,000) on each of said bonds, to " wit, the sum of three million dollars, and that execu- " tion issue therefor" (Record, pp. 40, 41).

Assignment of Errors.

The appellant submits that said judgment is erroneneous for the following reasons:

(*a*) That the bill of complaint did not pray for any such relief, nor did it state any facts upon which such judgment could be granted; that a decree founded upon an order *pro confesso* can only treat as confessed the facts alleged in the bill of complaint, and that there was an absence of confessed facts necessary to support the decree for deficiency appealed from.

(*b*) That the said bill contained no allegation that any of the principal of any of the bonds, either main line first mortgage bonds or main line income bonds, mentioned therein, was due at the commencement of the suit or would become due before 1920; on the contrary, no part of the said principal could become due at any time before January 1st, 1920.

(*c*) That neither any of the main line first mortgage bonds, nor the mortgage securing the same, which is attached as an exhibit to the said bill of complaint, and made part thereof, provides that the principal thereof, or any part thereof, shall upon any contingency become due before the first day of January, 1920; that there is no power vested in any person or corporation, by said deed of trust or mortgage, or by any of the bonds, to secure which it was given, to declare the principal or any part thereof due before the first day of January, 1920, and that by the tenor and legal effect of said bonds and said mortgage no part of said principal could become due before January 1st, 1920.

(*d*) That the said bill of complaint did not show that the main line income bonds, or any of them, or any part of the principal thereof, either had become due or would at any time before 1920 become due.

(*e*) That at the date of said so-called judgment for deficiency no balance had been found due to the complainant in said suit or to any bondholders represented by it over and above the proceeds of the sale made therein.

(*f*) That no such balance could have been found due upon or under the bill and proceedings in said cause.

(*g*) That there was and could have been no basis whatever for the statement in said so-called judgment for deficiency: "The Court therefore find that there is due from said defendant, The Ohio Central Railroad Company, to the complainant as trustee for the holders of said bonds secured by said first main line mortgage, upon each of said bonds the sum of eight hundred and two and sixty-eight and one-third one hundredth dollars ($802.68\frac{1}{3}$)," or for the statement therein: "Wherefore the Court find that there is due from the defendant, The Ohio Central Railroad Company, to the complainant, as trustee of the holders of said income bonds, upon each of said bonds the sum of one thousand ($1,000) dollars." That if such statements were intended to be findings of matters of fact, then they were wholly unsupported and contrary to the matters alleged in the bill and confessed by the said The Ohio Central Railroad Company, and that such findings could not have been made upon or under the bill and proceedings in said cause; that if such statements were intended to be conclusions of law, then there was nothing in the bill of complaint upon which to base such conclusions, and that no evidence was introduced or could have been offered upon which they or either of them could rest, and that the bill having been taken *pro confesso* and all subsequent proceedings being by law *ex parte* no facts could be proved or found except such as were alleged in said bill; and no facts were proved and none were as matter of law taken as true except as alleged in the bill.

(*h*) That the order *pro confesso* aforesaid directed that decree *pro confesso* be entered "according to the prayer of said bill," and it is provided by the rules of the Supreme Court that after

the entry of such an order only "the matter of the bill" may thereafter be decreed, and after the entry of said order the Court had power only to decree according to the prayer of the bill and only upon the allegations of the bill, and, therefore, no judgment for deficiency could lawfully be made or entered in said cause.

(*i*) And especially as to said income bonds, not only was there in the bill of complaint no prayer for any relief upon said bonds or the mortgage securing the same, and no allegation that any default had occurred upon them or that anything whatever either for principal or interest was due or would become due, but the principal of said bonds was not shown to be payable at any time, and upon the facts then existing, said bonds being merely income bonds, could earn no interest, and yet according to said so-called deficiency judgment they were converted into a present obligation of $3,000,000, bearing interest at six per cent.

POINTS.

I.

It is no objection to this appeal that the appellant allowed the case, as presented by the bill, to go by default, and that order PRO CONFESSO *was entered.*

Masterson vs. Howard, 18 Wall., 99.
Pac. R. R. Co. vs. Ketchum, 101 U. S., 289.

II.

The Court had no power to make such judgment for deficiency.

A.

Before the adoption of the 92d Rule, it was the law in the Federal Courts that a judgment for deficiency or an order in a decree directing payment of the deficiency, could not be made in a suit in equity for foreclosure.

Noonan vs. Braley, 2 Black, 499.

The subsequent case of Orchard vs. Stewart, 1 Wallace, 77, which held this rule to be applicable to Courts in the Territories, was reversed in Hornbuckle vs. Tombs, 18 Wallace, 678, but without disturbing the rule applicable to the United States Courts. This is evident from what is said in Hornbuckle vs. Tombs, and further from the case of Hurt vs. Hollingsworth, 100 U. S., 100.

It follows that the Federal Courts must find their authority for entering such a judgment or in any way directing the payment of a deficiency in a case of foreclosure, in the 92d Rule in Equity.

The 92d Rule authorizes a decree for deficiency only "*for any balance that may be found due to the complainant.*" Unless a balance is "found due to the complainant," there is no *power* in the Court to decree payment. This is a *condition* of jurisdiction or power.

B.

This rule does not mean that without regard to the pleadings and proceedings in the cause, the Court may give itself jurisdiction or power to decree deficiency by

merely inserting in the entry of judgment the bare statement that it finds a certain balance due to the complainant. A balance must be found due upon the pleadings or upon pleadings and evidence; the finding must have legal support. The Court has no power to decree payment of deficiency, unless it actually finds, and upon some legal basis, that there is a balance due the complainant.

If, therefore, as in this case, the entry of judgment states a finding, but the record discloses that upon the pleadings and proceedings no such finding could have been made according to legal methods, the judgment is without jurisdiction and beyond the power of the Court.

"Though the Court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by law."

FIELD, J., in Windsor vs. McVeigh, 93 U. S., 274.

C.

It is evident from the so-called judgment for deficiency itself that the Court did not find *as a fact* that anything was due upon either the first mortgage or the income bonds. The statements are: "The Court *therefore* find," etc., and, "*Wherefore*, the Court find." etc. These are but conclusions appearing to be drawn from the preceding statements of what appeared to the Court. What so appeared according to these statements was wholly insufficient to warrant the conclusion; it did not appear, as there shown, that anything was *due* upon any of either class of bonds, but only that from the proceeds of sale only interest to June 30,

1885, and $197.31⅓ on account of principal had been paid on each first mortgage bond, and that no other payments of principal or interest had been made thereon, and that no payments had been made on the income bonds. These facts warranted the conclusion that the greater part of the principal of the first mortgage bonds and all the principal of the income bonds was *unpaid*, but not that such principal was *due*. Certainly they did not warrant the conclusion that anything was *due* to the *complainant*.

D.

The Court could not have found upon any legal basis that anything was due to the complainant; nor to any one else.

Because:

(*a*) Order *pro confesso* having been entered, there could be no findings except such as were confessed upon the bill; and the bill, so far from supporting, negatives such a finding.

See Points III., IV. and V., *post*.

(*b*) The scope of the bill, without regard to the order *pro confesso*, was not broad enough either in its allegations or its prayer to allow such a judgment.

See Points IV. and V., *post*.

(*c*) As matter of fact, shown by the bill, nothing was due on either class of bonds.

E.

The 92d rule was not intended to authorize a decree for deficiency for which no basis could be found in the allegations of the bill.

"The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts."

MARSHALL, C. J., in Crocket vs. Lee, 7 Wheat., 523.

And this rule is spoken of in the same opinion as one of those "which have been established for ages, on the soundest and clearest principles of general utility."

It is not to be thought, in the absence of any language clearly showing it, that the Supreme Court in framing the 92d Rule, intended to make an exception to a rule of procedure, "which justice requires," one "which necessity imposes on courts," one "which has been established for ages, on the soundest and clearest principles.

F.

The 92d Rule was not intended to authorize the granting of a judgment for deficiency without regard to the purpose of the suit; or to do away with the rule that only relief specifically prayed for can be decreed *pro confesso.*

"It is certainly a correct principle that the Court cannot decree to any plaintiff, whatever he may prove, more than he claims in his bill. Nothing further is in issue between the parties."

MARSHALL, C. J., in Simms vs. Guthrie, 9 Cranch, 19.

And the rule as to decree *pro confesso* is stronger than in the case of answer and proofs. The defendant allows the bill to be taken as confessed upon considering the allegations and the relief sought. He is entitled to rely upon the prayer as limiting the possibilities of the decree.

And in this case the order *pro confesso* ordered that decree *pro confesso* be entered "*according to the prayer of said bill.*"

The bill prays for no personal judgment against the defendant; it seeks only the establishment and enforcement of the mortgage lien and the foreclosure of the equity of redemption of the mortgagor. It does not claim that anything but interest is due, and a prayer for a deficiency judgment, if it had been inserted, would have been evidently inconsistent with the whole theory of the bill.

So far as the income mortgage is concerned, no relief whatever is sought. Its existence is set up because it is an inferior lien. Had the trustee therein been other than the complainant, such trustee would have been made defendant. The suit was brought to foreclose the first mortgage. No default, no cause of action under the income mortgage, is set up. No relief either is or could have been asked upon it. Yet the so-called judgment for deficiency, to the amount of $3,000,000, is based upon the income bonds. The 92d rule authorizes decrees in suits "for the foreclosure of mortgages," for "any balance that may be found due to the complainant." Undoubtedly this means for any balance due of the debt secured by the mortgages sought to be foreclosed. It does not warrant a decree for what may be due the complainant upon any debt other than that covered by the mortgage or mortgages foreclosed.

III.

The Ohio Central Railroad Company having failed to answer, and an order for decree pro confesso having been entered, the Court could not legally find, as the founda-

tion of any judgment or decree against it, any fact not within the allegations of the bill.

If there had been an answer interposed, issues raised and proofs taken, the allegations of the bill would, of course, limit the scope of the decree. Authorities need not be cited in support of this rule, spoken of by Chief-Justice MARSHALL (Crocket vs. Lee, 7 Wheat., 523), as "established for ages, on the soundest and clearest principles of general utility."

But there are peculiar limitations in suits in equity after entry of orders *pro confesso*. Equity Rule 18 provides that after entry of such an order "the cause shall be proceeded in *ex parte*, and the *matter of the bill* may be decreed," etc.

"The defendants not having answered to the bill in the Court below it has been taken *pro confesso*, and the cause is, therefore, to be decided upon the title and equity apparent on the face of the bill."

STORY, J., in Jewett vs. Taylor, 9 Cranch, 43.

"To take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and a decree *pro confesso* is a decree *based upon such statements*, assumed to be true."

BRADLEY, J., in Thompson vs. Wooster, 114 U. S., 104.

Therein Judge BRADLEY further says:

"It is thus seen that by our practice a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made), by the Court, according to what is proper to be decreed *upon the statements of the bill*, assumed to be true."

"The matter of the bill," and nothing else, can

thereafter be decreed. No findings upon which to base decree, are possible, save such as are based upon the allegations of the bill. Certainly none can be made which are *contrary* to the bill itself.

The proceedings, after order *pro confesso*, are, by express provision of law, *ex parte*. In the case of Thompson vs. Wooster, *supra*, Judge BRADLEY even questions whether the defendant might appear in subsequent proceedings. Certainly the defendant need not regard them under Rule 18, but may rest assured that the Court can and will decree only "the matter of the bill" and will grant no decree against him except such as is properly based upon the allegations of the bill. The allegations of the bill in this case were true; they could not be denied; the relief specifically asked for, the complainant, beyond dispute, was entitled to. The Ohio Central Railroad Company having appeared, found nothing in the bill to deny, and found its allegations sufficient to warrant the relief sought. It put in no answer, and the order *pro confesso* was entered. Thereafter by law the proceedings were *ex parte*. It was no longer an active party. But as against it no findings could be made save according to the bill. Nothing could be decreed but "the matter of the bill." Unless it somehow appeared from the bill that there was, on June 22, 1887, something due to the complainant from it, after application of the proceeds of sale, the Court could not have legally found anything so due.

IV.

The bill in said cause alleges nothing upon which anything could be found due to the complainant, The Central Trust Company.

The first mortgage bonds are alleged to be "outstanding in the hands of divers persons as holders thereof," and the holders of the income bonds are alleged to be unknown to the complainant. It does not appear that the complainant ever owned a single one of either class of bonds, and whatever might at any time become due upon any of them would be due to the holders thereof and not in any sense to the Central Trust Company.

The complainant was trustee in the mortgages. The first mortgage only is attached to the bill. That may be searched through and through without discovery of anything which even hints at any authority vested in the Central Trust Company to represent the bondholders, save with respect to the *property mortgaged*. Save in that respect it was not "trustee of the holders of said bonds." Could it seriously be suggested that the Trust Company could sue upon either bonds or coupons, after maturity, as trustee of the bondholders? Nothing could become due to it at any time upon the bonds or coupons. A finding that anything was due to the complainant upon the bonds would be not only unsupported by the bill, but contrary to its allegations.

V.

The said bill contained no allegations upon which any of the principal of any of the bonds, first mortgage or income bonds, could be found due to any one.

The first mortgage bonds, as shown by said bill, became due January 1, 1920. There is no provision that they become due before that date upon any contingency whatever.

The only words in the mortgage which in any way look to possible *payment* before maturity are (1) the provision in paragraph first that in case of the *entry* by the trustee therein provided for the income and revenue shall be applied after payment of the interest upon the principal of the bonds; and (2) the provision in paragraph second that the proceeds of sale under the power of sale by the trustee shall be applied "to the ratable payment of principal and the then accrued interest of all the said bonds, *whether the said principal be then due or not*," and on the contrary it is provided in paragraph third that in case of entry or of proceedings to sell for default in interest, the payment of interest in arrears and costs, etc., shall put an end to all such proceedings.

These provisions, so far from making the bonds due by reason of default in interest, absolutely negative the suggestion of any such result. The words "whether the said principal be then due or not," in the power of sale, show beyond a question that it was not the intention to make the bonds due before the expressed maturity, although it was intended that in case a sale of the property was made the proceeds should be applied to the payment of the bonds before maturity.

It hardly needs authority to sustain this position, but in the case of Chicago, &c., R. R. Co. vs. Fosdick, 106 U. S., 47, the Court, after referring to a provision in the mortgage that in case of sale the whole property is to be sold and the proceeds are to be applied, after the payment of interest, to payment of principal, says: "This provision does not, either in terms or in effect, make the whole debt due before the stipulated day of payment."

Howell vs. Western R. R. Co., 94 U. S., 463.

See also

Holden vs. Gilbert, 7 Paige, 208.

The position taken by us does not involve questioning the judgment in respect to its direction that the proceeds of sale be applied upon principal as well as interest, since, without regard to the fact that the principal of the bonds was not due, this was proper under the authority of Olcutt vs. Bynum, 17 Wall., 44.

See also Willmer vs. Atlantic, &c., Railway Company, 2 Woods, 453.

Howell vs. Western R. R. Co., 94 U. S., 463.

As to the income bonds, the bill does not show when, if ever, any principal becomes due upon them. If the mortgage had been produced, it would have appeared that they could not become due until 1920.

VI.

The relief granted by the judgment for deficiency was not within the prayer of the bill.

See *ante* Point II., Subd. F.

VII.

A judgment cannot be rendered without a hearing. After the entry of the order *pro confesso* the proceedings were by law *ex parte :* the Ohio Central Railroad Company was not, perhaps could not be, before the Court, and so far as anything was attempted to be adjudged which did not flow from the bill as aforesaid, it was a judgment without a hearing, and therefore a nullity. It was given an opportunity to be heard as to the bill. It confessed the allegations thereof, and the

decree of sale of December, 1884, was a valid decree. But when the Court attempted, after the defendant was out of Court, to decree anything not authorized by the allegations and the prayer of the bill, it attempted to decree without giving the defendant opportunity to be heard.

" Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principal of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor vs. McVeigh, 93 U. S., 274.

Last Point.

The said judgment for deficiency should be wholly reversed and set aside, with costs.

ASHBEL GREEN,
H. L. TERRELL,
THOMAS THACHER,
Counsel for Appellants.

Addendum.

As to the contention of counsel for the appellees, that its property and franchises having been sold out under the decree herein the railroad company has left no corporate power to prosecute this action, it is submitted.

1. Only that which the mortgage covered, of course, was sold under the decree. The mortgage did not cover all the property or franchises of the railroad company. It did not cover the river division or the franchises connected therewith (Record, page 4, folio 7). It did not cover the franchises resulting from the consolidation, or those formerly of the Atlantic & Northwestern Railroad Company (Record, page 3, folio 5, and page 19, folio 38). It covered only the franchises belonging to the main line of railroad therein described (Record, page 10, folio 18, and page 19, folio 38).

2. The mortgage certainly did not cover, probably could not have been made to cover, and the sale under the decree did not transfer or extinguish the franchise to be a corporation.

Memphis R. R. Co. vs. Berry, 112 U. S., 609.
Willamette Co. vs. Bank, 119 U. S., 191.

The statement on pase 2 of appellee's brief, that by its decree the Court ordered the sale of *the entire property* of the Railroad Company, is manifestly erroneous.

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CLERK.

In the Supreme Court of the United States.

THE OHIO CENTRAL RAILROAD COMPANY
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK.

IN CHANCERY.
APPEAL.

STEVENSON BURKE.
Solicitor for Appellee.

In the Supreme Court of the United States.

The Ohio Central Railroad Company	
vs.	In Chancery.
The Central Trust Company of New York.	Appeal.

STATEMENT OF CASE.

On the 7th day of January, 1884, the Central Trust Company of New York, the trustee in a mortgage executed January 1st, 1880, by the Ohio Central Railroad Company to secure three thousand bonds of one thousand dollars each, the interest evidenced by coupons payable every six months, default having been made in the payment of the interest, filed its bill in the Circuit Court of the United States for the northern district of Ohio, western division, to foreclose the mortgage. A copy of the mortgage, together with a copy of the bonds issued, was filed with the bill, and they are copied into the record. The record, page 17, shows that the railroad company defaulted not only in the payment of its coupons, but in filing an answer or

demurrer to the bill of complaint; that a decree *pro confesso* was entered on the 10th day of December, 1884, by the circuit court, finding certain coupons due and unpaid, and ordering and directing payment thereof, and, in default of such payment, the sale of the entire mortgaged premises.

By its decree the circuit court ordered the sale of the entire property of the railroad company, "to-" gether with all and singular the powers and fran-" chises thereto belonging." (See page 19 record.)

The court found that sundry series of coupons fell due during the pendency of the action in court. Whereupon the court ordered the sale of the railroad and all the other property and franchises of the railroad company to be sold and the proceeds to be applied as shown by the record, page 22.

The record shows that the court made a further decree in the case, beginning on page 23, which last decree was made on the 4th day of February, 1885. In this decree the court again ordered the sale of the property and directed the application of the proceeds. Thereupon, and in pursuance of that decree, an order of sale was issued to the proper master commissioner of the court, ordering and directing him to sell the mortgaged premises in accordance with the decree and order of the court. This order of sale was made returnable May 5th, 1885, but was in fact returned April 15th, 1885. (See record, page 29.)

The master returned that, in pursuance of the order of sale, he had made the publication, given the notice required by the order, specifying the newspapers in which the publication was made, and the other notice given by him, and that he had offered the entire property for sale according to the order of the court, and had sold the same for one million dollars to Charles J. Canda and others as purchasing trustees.

The proof of publication is contained in the record.

Thereupon the court made a reference to a master commissioner to ascertain and report upon the division of the proceeds of the sale. After the coming in of this report, and on the 25th day of June, 1885, the court, after due examination, approved and confirmed the sale of railway property made by the master, and on page 36 of the record made a specific decree as to the application of the proceeds, $197.31\frac{1}{3}$ being applicable and applied upon each of the three thousand first mortgage bonds of the railway company.

The court, on page 38 of the record, reserved to itself "all further questions in respect to the accounts " of said *receiver* and as to judgment for any *deficiency* " herein."

On the 22d day of June, 1887, (see record, page 40,) judgment was entered for the deficiency, the record showing "This day this cause came on for further " hearing, and it appearing to the court that from the " proceeds of the sale of the property of said defend-

" ant company in this cause heretofore made there " have been paid upon each of the three thousand " bonds secured by the first main line mortgage in the " bill of complaint set forth, the interest coupons " thereon up to and including June 30th, 1885, and " the sum of one hundred ninety-seven and thirty-one " and two-thirds one hundredths dollars ($197.31\frac{2}{3}$) to " be applied upon the payment of the principal of each " of said bonds, said payment to bear date of June " 30th 1885, and no other payment of either principal " or interest have been made upon any of said bonds " than aforesaid; the court therefore find that there is " due from said defendant, The Ohio Central Railroad " Company, to the complainant, as trustee for the " holders of said bonds secured by said first main line " mortgage upon each of said bonds, the sum of eight " hundred and two and sixty-eight and one-third hun- " dredths dollars ($802.68\frac{1}{3}$), which sum should bear " interest at the rate of six per cent. per annum until " paid. And the court further finds that no fund has " come under the control of this court from which any " payment can be made upon the three thousand main " line income bonds in the bill of complaint set forth, " and that no payments of any kind have been made " upon any of said income bonds. Wherefore the " court finds that there is due from the defendant, The " Ohio Central Railroad Company, to the complainant, " as trustee of the holders of said income bonds, upon

" each of said bonds, the sum of one thousand dollars.
" Wherefore it is ordered, adjudged and decreed that
" the complainant, The Central Trust Company of New
" York, as trustee for the holders of said three thousand
" bonds secured by said first main line mortgage, have
" and recover from the defendant, The Ohio Central
" Railroad Company, the sum of eight hundred and
" two and sixty-eight and one-third hundredth dollars
" ($802.68⅓) on each of said bonds, to-wit, the sum of
" two million four hundred and eight thousand and
" fifty dollars, with six per cent. per annum from July
" 1st, 1885."

This is the order from which an appeal has been taken, and which the railroad company prays may be reversed.

POINTS.

The first question to be considered is whether the railroad company is in position to take an appeal and to make the question presented.

The record shows that the railroad property, together with the *franchises* of the railroad company were sold out under the decree of the circuit court in April, 1885, and that the sale so made was confirmed by the court June 25th, 1885. The railroad company is therefore in liquidation or insolvent, unable to meet its liabilities, its franchises mortgaged and sold.

Under the circumstances, therefore, we maintain

that there is no corporate power left in the railroad company to prosecute this or any other action.

The point is made, however, that the bonds were not due at the time execution was issued, and that notwithstanding the fact that the railroad company is in liquidation, and notwithstanding the fact that it has been sold out and a partial payment made upon its bonds to fall due in the future, that neither the trustee nor the holders of the bonds can proceed to execution against the railroad company in liquidation until the indebtedness evidenced by the bonds shall fall due by the terms of the bonds.

It is manifest that the only purpose of the final order was to establish a basis upon which to file a creditor's bill against the railway company and its stockholders. Confessedly the circuit court had full jurisdiction to ascertain and determine the amount of indebtedness remaining due and unpaid upon the bonds in question, and whether the order for execution under the circumstances is erroneous, is really the only question for consideration here.

It is manifest that so far as the final order or decree of the court determines and settles the balance due and unpaid upon the bonds, that there is no error in the order, and the only error, if any, is in the ordering of execution.

2. Whether there is any error in the ordering of execution must depend upon the practice of equity

courts in such cases, and upon the rules of practice established by this court.

The case comes within the 92d rule, which provides, "In suits in equity for the foreclosure of mortgages in "the Circuit Courts of the United States * * * * "a decree may be rendered for any balance that may "be found due to the complainant over and above the "proceeds of the sale or sales, and execution may issue "for the collection of the same."

We understand this rule to provide "that a decree "may be rendered for any balance that may be found "due to the complainant."

By "due" we understand any existing indebtedness connected with the subject of the action, whether such indebtedness is presently payable or not.

Indeed, when a corporation becomes insolvent, and its property and franchises are sold and disposed of, and there is a balance remaining unpaid to its creditors, the case is one for a court of equity to deal with, and clearly a court of equity in such a case has jurisdiction to ascertain and determine the amount remaining unpaid upon the indebtedness; and the corporation being in liquidation, being insolvent, we think the court would have the power to issue execution, collect in its assets and make the proper distribution of the same among its creditors. The decree ordering execution should be affirmed.

STEVENSON BURKE,
Solicitor for Appellee.